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Title: Francine Tafflin, et al., Petitioners,
v.
Jeffrey A. Levitt, et al.

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Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Leshko,Gary L.

Counsel for respondent: Marks,Andrew H., Krause,Paul D., Burns Jr.,Harold H., Winter,Stephen C., Frederick,Alvin I., Radding,Andrew, Possick,Howard B., Brown,C. Christopher

Entry	Date	Note	Proceedings and Orders
1	Apr 8 1989	G	Petition for writ of certiorari filed.
2	May 9 1989		DISTRIBUTED. May 25, 1989
3	May 10 1989	X	Brief of respondents Jeffrey A. Levitt, et al. in opposition filed.
4	May 30 1989		Petition GRANTED. limited to Question 2 presented by the petition.
			**********
5	Jul 14 1989		Brief of petitioner Francine Tafflin filed.
6	Jul 14 1989		Joint appendix filed.
7	Aug 16 1989		Brief of respondents Jeffrey A. Levitt, et al. filed.
8	Aug 25 1989		CIRCULATED.
9	Aug 29 1989	*	Record filed. Certified copy of original record and proceedings, 19 volumes, 2 boxes, received.
10	Sep 15 1989	X	Reply brief of petitioner Francine Tafflin filed.
11	Sep 26 1989		SET FOR ARGUMENT MONDAY, NOVEMBER 27, 1989. (4TH CASE)
13	Nov 3 1989	D	Motion of petitioners for leave to file petition for rehearing of partial denial of petition for writ of certiorari filed.
14	Nov 13 1989		Motion of petitioners for leave to file petition for rehearing of partial denial of petition for writ of certiorari DENIED.
15	Nov 27 1989		ARGUED.

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88-1650

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

FRANCINE TAFFLIN, *et al.*,

Petitioners,

v.

JEFFREY A. LEVITT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

M. Norman Goldberger
Brian P. Flaherty
*Gary L. Leshko
WOLF, BLOCK, SCHORR AND SOLIS-COHEN
Twelfth Floor, Packard Building
15th and Chestnut Streets
Philadelphia, PA 19102-2678
(215) 977-2000

Attorneys for Petitioners
**Counsel of Record*

Of Counsel:

Lawrence I. Weisman
306A Hampton Plaza
300 E. Joppa Road
Towson, Maryland 20204
(301) 583-9030

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA 19103 (215) 563-9000

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in affirming the dismissal of Petitioners' claim under the Securities Exchange Act of 1934, 15 U.S.C. §78 *et seq.*, on the ground that the certificates of deposit purchased by Petitioners from a non-federally-insured savings and loan institution are not securities despite the absence of an effective and comprehensive regulatory and insurance system in the State of Maryland.

2. Whether the Court of Appeals erred in holding that federal courts do not have exclusive jurisdiction over civil actions brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961-68, and that state courts have concurrent jurisdiction over such actions.

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Petitioners

A(1). Plaintiffs in No. 88-3019 below:

Francine Tafflin; Seymour Zuckerman; Eris Zuckerman; Renalee Selvin; Joan Zuckerman; Sylvia Zuckerman; Seymour Zuckerman, Executor of the Estate of Samuel Zuckerman; George R. Lyon; George C. Lyon; Peter M. Lyon; Bruce K. Lyon; Elizabeth A. Lyon; George R. Lyon and Mary G. Lathrop, Personal Representatives of the Estate of George M. Lyon; Kent H. Butcher; Stanley Z. Felsenberg, M.D., Personal Representative of the Estate of Minnie Felsenberg; Margaret Graves; Thurman L. Graves; Sandra L. Pletka; Gertrude Durso; Enterprise Equipment Co., Inc.;* Carmen R. Goldings; Clelia S. Goldings; Ethan D. Goldings; Herbert J. Goldings, M.D.; Sarah M. Goldings; Doris Konig; Windell R. Carter; Catherine Carter; Mitchell W. Landy; and Rio Grande Savings & Loan Association,* individually and as representatives of a class of purchasers of Old Court certificates of deposit (*see* Amended Complaint in Maryland Federal District Court No. B-87-668, ¶ 1).

A(2). Plaintiffs in No. 88-3020 below:

Francine Tafflin; Seymour Zuckerman; Eris Zuckerman; Renalee Selvin; Joan Zuckerman; Sylvia Zuckerman; Seymour Zuckerman, Executor of the Estate of Samuel Zuckerman; George R. Lyon; George C. Lyon; Peter M. Lyon; Bruce K. Lyon; Elizabeth A. Lyon; George R. Lyon and Mary G. Lathrop, Personal Representatives of the Estate of

George M. Lyon; Gertrude Durso; Enterprise Equipment Co., Inc.;* Carmen R. Goldings; Clelia S. Goldings; Ethan D. Goldings; Herbert J. Goldings, M.D.; Sarah M. Goldings; Doris Konig; Windell R. Carter; Catherine Carter; Mitchell W. Landy; and Rio Grande Savings & Loan Association,* individually and as representatives of a class of purchasers of Old Court certificates of deposit (*see* Amended Complaint in Maryland Federal District Court No. B-87-684, ¶ 1).

Respondents

B. Defendants in Nos. 88-3019 and 88-3020 below:

Jeffrey A. Levitt; LCP Corporation; Allan H. Pearlstein; Jerome S. Cardin; Light Street Partnership; Allen Feinberg; Robert D. Pearlstein; Samuel Shoubin; Dennis E. Guidice; Karol Levitt; Rosemary Pearlstein; Old Court Savings & Loan, Inc.; Maryland Savings-Share Insurance Corp.; Charles C. Hogg, II; Paul B. Trice, Jr.; George W. H. Pierson; Jerome F. Dolivka; Francis F. Anderson; Michael J. Dietz; Leonard Bass; John C. Donohue, Sr.; Henry R. Elsnic; John D. Faulkner, Jr.; James D. Laudeman; Terry L. Neifeld; Glass and Associates, P.A.; Cardin and Cardin, P.A.; Venable, Baetjer & Howard; and David Uhlfelder.

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* Pursuant to Supreme Court Rule 28.1, Petitioners state that neither Enterprise Equipment Co., Inc. nor Rio Grande Savings & Loan Association has any parent companies, subsidiaries or affiliates.

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OCTOBER TERM, 1988

FRANCINE TAFFLIN, *et al.*,
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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

REFERENCE TO OPINIONS OF COURTS BELOW

The opinion of the Court of Appeals is reported at 865 F.2d 595. The opinion of the District Court was delivered from the bench and has not been reported in any known official or unofficial reporter. Attached in the Appendix hereto are copies of the Opinions, Orders and Judgments issued by the United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Maryland.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 12, 1989.

This Court has jurisdiction to review the issues presented herein by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

The verbatim text of the following statutory provisions is provided in the Appendix attached hereto:

The Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10).

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c).

STATEMENT OF THE CASE AND BASIS OF FEDERAL JURISDICTION

The two consolidated actions below arise from the failure of Old Court Savings & Loan, Inc. ("Old Court") and the attendant collapse of the Maryland Savings-Share Insurance Corporation ("MSSIC"), a private corporation controlled by the Maryland savings and loan industry, the asserted purpose of which was to regulate that industry and to protect depositors and investors in Maryland savings and loan institutions, such as Old Court, which were not federally insured. As set forth in detail in the Amended Complaints, the failure of Old Court resulted directly from a massive fraud and other wrongful acts committed by the officers and directors of Old Court, the officers and directors of MSSIC, and the other defendants. (¶¶ 51-101.)[1]

Plaintiffs in the instant actions (Petitioners in this Court) purchased certificates of deposit from Old Court in reliance upon the purportedly insured status of the certificates and representations by Old Court and MSSIC that such investments were safe. (*See, e.g.*, ¶¶ 13-48.) However, unknown to plaintiffs, Old Court's principals were using Old Court to raise large amounts of capital to dispose of and invest for their own personal benefit, in part through the generation of cash by selling

1. Throughout this Petition paragraph references will be to the Amended Complaint in Civil Action No. B-87-684 in the Maryland District Court. (No. B-87-684 was designated as No. 86-0092 when the action was initially instituted in the United States District Court for the Eastern District of Pennsylvania, prior to its transfer to the United States District Court for the District of Maryland.) In No. B-87-684, the plaintiff class consists only of citizens of states other than Maryland, thereby vesting the District Court with diversity jurisdiction as well as federal question jurisdiction, since all defendants are Maryland citizens. The other action involved herein, No. B-87-668 (which was No. 86-0090 in the Eastern District of Pennsylvania) includes Maryland plaintiffs in addition to plaintiffs from other states. In all other respects, the actions are identical.

Old Court certificates of deposit both inside and outside the State of Maryland. (¶ 78.) The sale of Old Court certificates of deposit was promoted by a massive national advertising campaign orchestrated by Old Court's principals. (¶¶ 79-80.)

Additionally, the Old Court defendants and MSSIC together prepared and distributed numerous letters, brochures and other materials emphasizing the risk-free nature of investments and deposits at Old Court based upon the representation that they were fully insured up to $100,000 per account. (¶ 82.) The advertisements and other representations relied upon by plaintiffs and the public were intended to create, and did create, the false impression that Old Court certificates of deposit were safe investments, insured by a governmental agency similar to the Federal Deposit Insurance Corporation ("FDIC") and the Federal Savings and Loan Insurance Corporation ("FSLIC"). (¶ 83.)

However, while MSSIC was held out as a "regulator" of the Maryland savings and loan industry, it actually functioned as a captive agent of that industry and of Old Court in particular, participating in and covering up Old Court's fraud on the plaintiffs and other investors. (¶¶ 86-89.) MSSIC knew that Old Court certificates of deposit were not "safe" investments because, *inter alia,* several of Old Court's insiders were diverting substantial funds for their own use, Old Court was known by MSSIC to be a "habitual violator" of MSSIC's rules and regulations, and Old Court was making insider loans in amounts prohibited by MSSIC and state regulations. *Id.* Moreover, MSSIC falsely represented to the public that its "insurance" was sufficient to protect each of the accounts at all of its 101 member savings and loan institutions, when in fact MSSIC had insufficient liquid assets to back up the claimed insurance. (¶ 90.) Finally, MSSIC falsely implied that it was part of the government of Maryland and that it provided insurance comparable

to that supplied by the Federal Government through FSLIC and FDIC. (¶¶ 90, 94.)

The various defendants knowingly and intentionally conspired with each other to cover up the fact that Old Court was being run solely for the benefit of those associated with it and that, as a result, Old Court was on the brink of financial disaster and was, in fact, insolvent. (¶¶ 84-99.) Plaintiffs allege in detail the complete ineffectiveness of the Maryland regulatory and insurance schemes, which not only permitted but facilitated the depredations of Old Court's principals, including their fraudulent inducement of investors such as plaintiffs and their diversion of funds from Old Court into personal and business enterprises. (¶¶ 86-90, 96-98.)

Inevitably, a run on Old Court took place, and Old Court was unable to meet the demands for withdrawals by its customers. On May 13, 1985, Old Court was placed in conservatorship. Since approximately June 7, 1985, all withdrawals from all accounts at Old Court have been prohibited, with a few minor exceptions. On or about November 8, 1985, the Old Court conservatorship proceeding was converted into a receivership proceeding. (¶¶ 99-108.) The receiver, Maryland Deposit Insurance Fund ("MDIF"), stated that owners of Old Court certificates of deposit will not receive any interest on their certificates accruing after November 8, 1985, nor will they receive the difference between the 5½% interest rate which accrued on certificates that matured between May 13, 1985 and November 8, 1985 and the interest rate which such certificates bear. (¶ 114.)

Accordingly, in January, 1986, plaintiffs, individually and on behalf of two classes of purchasers of Old Court certificates of deposit, filed the instant actions in the United States District Court for the Eastern District of Pennsylvania, asserting claims under the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78 *et seq.,* and the Racketeer Influenced and Corrupt

Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, as well as various pendent state law claims.

After the actions were filed in the Eastern District of Pennsylvania, all defendants responded with motions to dismiss and/or transfer the actions to the District of Maryland. The motions to dismiss were based principally upon arguments that plaintiffs had not stated a claim under the federal securities laws because the certificates of deposit purchased by plaintiffs are not securities; that plaintiffs had failed to allege properly the elements of their RICO claims; and that the District Court should abstain from adjudicating any of plaintiffs' claims. In response, plaintiffs argued that the certificates of deposit are securities, based primarily upon an analysis of the Securities Exchange Act of 1934 and this Court's decision in *Marine Bank v. Weaver,* 455 U.S. 551 (1982). Plaintiffs also argued, *inter alia,* that while abstention on any of plaintiffs' claims was inappropriate, the court should not in any event abstain with respect to plaintiffs' Exchange Act and RICO claims because jurisdiction over such claims is exclusively federal, and abstention is improper where a claim cognizable only in the federal courts is involved.

On February 17, 1987, the court in the Eastern District of Pennsylvania entered an Order transferring the cases to the District of Maryland; without resolving any other issues raised by defendants' motions. Following the submission of supplemental briefs, the parties presented argument to the court in the District of Maryland on December 4, 1987. The court ruled from the bench that same day, dismissing both cases.

The District Court first held that plaintiffs had failed to state a cause of action under the Exchange Act because it found that the Old Court certificates of deposit are not securities. The court then considered the abstention issues raised by defendants. As a threshold matter, the court determined that state courts have

concurrent jurisdiction over plaintiffs' RICO claims. Having decided that plaintiffs' RICO claims were cognizable in state court, the District Court felt that abstention was "a far more viable option," and proceeded to analyze the applicability of the abstention doctrines set forth in *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976), and *Younger v. Harris,* 401 U.S. 37 (1971). The District Court determined that it was appropriate to abstain under both *Burford* and *Colorado River,* and entered formal Orders dismissing both cases on December 8, 1987. (*See* Appendix.)

The Court of Appeals for the Fourth Circuit affirmed the District Court's Orders in an opinion rendered on January 12, 1989. The Fourth Circuit held that Old Court certificates of deposit are not securities under the Exchange Act based upon its reading of *Marine Bank.* The court also held, relying upon its recent decision in *Brandenburg v. Seidel,* 859 F.2d 1179 (4th Cir. 1988), that federal court jurisdiction over RICO is concurrent with the state courts, and that the District Court's decision to abstain and dismiss the instant actions was appropriate.

The basis for federal subject matter jurisdiction in the court of first instance is 28 U.S.C. § 1331 in both Case No. B-87-684 and Case No. B-87-668. Additionally, federal diversity jurisdiction is conferred by 28 U.S.C. § 1332 in Case No. B-87-684.

ARGUMENT

A. A Writ of Certiorari Should Be Granted To Determine Whether Certificates Of Deposit Such As Those Issued By Old Court Are "Securities" Under The Federal Securities Laws

1. The Holding Of The Court Below Is Inconsistent With A Prior Decision Of This Court

In *Marine Bank v. Weaver*, 455 U.S. 551 (1982), this Court held that a certificate of deposit issued by a federally regulated and insured bank was not a "security" for purposes of the federal securities laws. In so holding, the Court followed the traditional analytical method of determining first whether an instrument falls within the definition of "security" in the federal securities laws and, if it does, then determining whether the factual context in which the instrument was issued requires that it *not* be treated as a security.

In *Marine Bank*, the Court examined the underlying factual context and found that the comprehensive scheme of federal banking regulation applicable in that case "virtually guaranteed payment in full" to depositors in federally regulated and insured banks. *Id.* at 558. The Court reasoned that because of this "virtual guarantee," holders of certificates of deposit issued by federally regulated and insured banks were "abundantly protected" by the federal banking regulations, and it was therefore "unnecessary" in light of this protection to subject the issuers of such certificates to liability under the federal securities laws. *Id.* at 559.

Thus, the holding in *Marine Bank* was premised upon both the existence *and* the effectiveness of the federal banking regulations at issue. *See Marine Bank*, 455 U.S. at 558-59 and n.7. Specifically, in determining whether a certificate of deposit or other instrument is a security, *Marine Bank* requires an analysis of the factual context in which the instrument was issued, including

the applicability and efficacy of any regulatory system, to determine whether purchasers of such instruments are so "abundantly protected" that the protection of the federal securities laws becomes unnecessary. Thus:

> [e]ach transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the *factual setting as whole*.

Id. at 560 n.11 (emphasis added).

Under the rationale of *Marine Bank*, the certificates of deposit purchased by plaintiffs are securities. This Court has consistently held that the definition of the term "security" in the Exchange Act, 15 U.S.C. § 78c(a)(10), is to be liberally construed to include instruments which are not expressly identified by the language, as well as those which are explicitly included. *See Landreth Timber Co. v. Landreth*, 471 U.S. 681, 686 (1985); *Marine Bank*, 455 U.S. at 556; *Teamsters v. Daniel*, 439 U.S. 551, 558 (1979). In examining the nature of certificates of deposit, it is apparent that they are instruments which are the functional equivalent of "notes", "bonds", "debentures", or the "evidence of indebtedness" specified in the statutory definition. Like those instruments, their essential characteristic is that they represent a transaction in which the use of money is obtained in exchange for a promise to pay a fixed sum plus interest on some future date. As Judge Posner has noted:

> a certificate of deposit is a type of promissory note — and "note" of course is one of the instruments specifically listed in section 3(a)(10) [of the Exchange Act] — and it is also what is "commonly known as a security."

Sutter v. Groen, 687 F.2d 197, 200 (7th Cir. 1982)

(quoting section 3(a)(10) of the Exchange Act). Accordingly, certificates of deposit are presumptively securities under the federal securities laws, as this Court recognized in *Marine Bank*. *See Marine Bank*, 455 U.S. at 556-57.

The second phase of the inquiry is based upon the requirement in the Exchange Act that the statutory definition is to be applied "unless the context otherwise requires." 15 U.S.C. § 78c(a). Thus, the relevant issue is whether the Old Court certificates of deposit, which fall within the definition of "security" in the first instance, must be removed from the scope of the definition in light of the context in which they were issued.

In the instant actions, plaintiffs allege that the Maryland regulatory and insurance schemes which purportedly protected depositors and investors were completely ineffective and that, in addition, the entities charged with regulating the Maryland savings and loan industry were nothing more than accomplices in Old Court's fraud, which resulted in the massive losses alleged by plaintiffs. Therefore, the factual context in which the Old Court certificates of deposit were issued was entirely different from that in *Marine Bank*, and wholly insufficient under *Marine Bank* to remove the certificates from the coverage of the federal securities laws. Unlike in *Marine Bank*, there was no effective regulatory scheme in Maryland which "virtually guaranteed" repayment and thereby "abundantly protected" purchasers of Old Court certificates of deposit.

The Fourth Circuit's fundamental approach to determining whether the Old Court certificates of deposit are securities was inconsistent with the analysis required by *Marine Bank*. Initially, the court below agreed that, under the statutory definition of "security" in the Exchange Act, it "might well conclude" that the Old Court certificates of deposit purchased by the plaintiffs are securities entitled to the protection afforded by the Exchange Act. 865 F.2d at 598. The court also noted

that, under *Marine Bank*, a certificate of deposit may be removed from the definition of "security" under the Exchange Act if there is in place a "comprehensive regulatory and insurance system." *Id.* at 598-99.

The Fourth Circuit erred, however, when it failed to recognize this Court's concern evidenced in *Marine Bank* that the system of regulation must not simply exist on paper, but must also be *effective* in protecting the holders of certificates of deposit before the certificates can be removed from the ambit of the securities laws. *See Marine Bank*, 455 U.S. at 558-59 and n.7. Instead, the Fourth Circuit utilized an approach which was fundamentally at odds with the factual context analysis required by *Marine Bank*, and which ignored this Court's directive that the "factual setting as a whole" must be analyzed in determining whether a particular certificate of deposit or other instrument is a security. *See id.* at 560 n.11. Thus, while it recognized that the Maryland regulatory system was "ineffective," the court below dismissed that critical fact, without analyzing whether Old Court certificate of deposit holders were "abundantly protected" by such an ineffective regulatory scheme, with the summary statement that:

> we do not think that *Marine Bank* depends upon the effectiveness of the regulatory scheme as it may have been administered.

865 F.2d at 599.[2]

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2. The court also opined that when the Old Court certificates of deposit underlying these actions were issued, "there had been no break down in Maryland's then regulatory scheme, and neither Old Court nor MSSIC was insolvent." 865 F.2d at 599. However, as alleged in the Amended Complaints, Maryland's "regulatory scheme" was wholly ineffective, and Old Court, which issued certificates of deposit until virtually the day it collapsed (*see, e.g.*, ¶¶ 31, 100), was in fact insolvent during at least part of the time in which the certificates of deposit were issued. (¶¶ 84-99). At a minimum, this presents a factual question which precludes dismissal of the case under Fed. R. Civ. P. 12(b)(6), but which was ignored under

This approach led the Fourth Circuit to the erroneous conclusion that the mere existence of statutes, rules and regulations concerning the Maryland savings and loan industry at the time plaintiffs were fraudulently induced to purchase Old Court certificates of deposit was sufficient to remove those instruments from the reach of the federal securities laws, a conclusion wholly inconsistent with the rationale and holding of *Marine Bank.*

Moreover, the Fourth Circuit found it "significant" that the result in *Marine Bank* itself "did not depend upon the *complete* effectiveness of the federal scheme," because some federally chartered or insured institutions fail, and because Congress only recently placed the full faith and credit of the United States behind federal insuring agencies. 865 F.2d at 599 (emphasis added). The issue under *Marine Bank,* however, is not whether a regulatory system is absolutely infallible, but whether the system is *sufficiently* effective so that depositors are "virtually guaranteed payment in full." *Marine Bank,* 455 U.S. at 558. Viewing the "factual setting as a whole," this Court in *Marine Bank* found that such a degree of effectiveness existed, because the investors were "abundantly protected" by the federal banking laws. In the setting in which plaintiffs purchased their certificates of deposit, however, the system was completely ineffective, and plaintiffs were unprotected by Maryland's regulatory system. The lower court's failure to undertake any analysis of this factual setting was improper under *Marine Bank,* and led directly to the court's erroneous conclusion.

Moreover, even under the Fourth Circuit's approach to this issue, it reached an incorrect result, since plaintiffs allege a system operating at the polar opposite of a

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NOTES *(Continued)*
the Fourth Circuit's flawed ... oach to the *Marine Bank* analysis.

"completely effective" system. The statutes and regulations in Maryland were completely *ineffective,* both inherently and as a result of their "administration" by entities controlled by the Maryland savings and loan industry.[3]

In light of the Fourth Circuit's fundamental misapplication of the analysis required by *Marine Bank,* Petitioners seek a Writ of Certiorari under Supreme Court Rule 17.1(c) to resolve this important question of federal law regarding the reach of the federal securities laws to protect purchasers of financial instruments which are not covered, or which are ineffectively covered, by state regulatory and insurance systems.

2. The Fourth Circuit's Application of *Marine Bank* Conflicts With The Analyses Of Other Federal Courts Of Appeals

The rationale and analysis of the Fourth Circuit in this case are inconsistent not only with *Marine Bank* itself, but also with the analysis of *Marine Bank* employed by other federal Courts of Appeals.

In *West v. Multibanco Comermex, S.A.,* 807 F.2d 820 (9th Cir.), *cert. denied,* 482 U.S. 906 (1987), a case dealing with Mexican bank certificates of deposit which lost much of their value because of the devaluation of the peso in the early 1980s, the court noted that there had been no bank failure in Mexico for over fifty years, a fact which indicated that Mexican banking regulations were the equivalent of American federal banking regulations in scope and effect. *Id.* at 827 (citing *Wolf v.*

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3. The Maryland legislature evidenced its recognition of the ineffectiveness of the system in place when plaintiffs purchased their certificates of deposit by completely overhauling Maryland's statutory scheme after the collapse of Old Court and MSSIC, beginning with a special session of the legislature in May, 1985, within weeks of Old Court's demise. *Compare* Md. Fin. Inst. Code Ann. Titles 8, 9 and 10 (1986 and Supp. 1988) *with* Md. Fin. Inst. Code Ann. Titles 8, 9 and 10 (1980).

Banco Nacional de Mexico, S.A., 739 F.2d 1458, 1462 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985)).[4] The plaintiffs in *West* argued that, while on paper the Mexican system appeared to provide protection, in reality the Mexican officials neither complied with nor enforced their own laws, and therefore the supposed regulatory protection did not in fact exist. 807 F.2d at 827.

The Ninth Circuit, applying the rationale of *Marine Bank* in light of its prior holding in *Wolf*, emphasized that a "trial court must hear evidence on the degree of protection that [the regulatory] structure offers a depositor against insolvency." 807 F.2d at 828 (quoting *Wolf*, 739 F.2d at 1463). In this context, the *West* court indicated that the actual *operation* of the regulatory system would be a relevant inquiry for the trial court. *Id.* at 828-29 and n.7.[5] The court below, however, reached its holding without considering – and, indeed, affirmatively rejecting any obligation to consider – the degree of protection offered by or the actual operation of the Maryland regulatory system.

Additionally, in *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230 (2d Cir. 1985), the Court of Appeals for the Second Circuit correctly recognized that:

4. In *Wolf*, the plaintiff conceded that the absence of any Mexican bank failure for over fifty years indicated the equivalence of the protection afforded by Mexican and American banking regulations. 739 F.2d at 1463. Accordingly, since there was as a matter of stipulated fact a comprehensive and effective regulatory system in place in Mexico, the certificates of deposit in *Wolf* could not be held to be securities under *Marine Bank*. *Id.* at 1463-64.

5. The court added that "a showing can be made either that the structure may not address the depositor's problems or that even with the regulatory system, banks nonetheless fail with some regularity." *Id.* at 828-29 n.7. The court, however, determined that it was unable to inquire into the alleged wrongdoing of Mexican officials in the case before it because of the "act of state" doctrine. *Id.* at 828-29 and n.7.

> [t]he crux of the *Marine Bank* decision is that federal banking regulations and federal deposit insurance *eliminate the risk of loss to the investor*, thereby obviating the need for the protection of the federal securities laws.

Id. at 240 (emphasis added).

Following the rationale of *Marine Bank*, the Second Circuit held, *inter alia*, that certificates of deposit are not exempt from the federal securities laws where the purchasers are not otherwise "abundantly protected". *Id.* at 241.

Petitioners request this Court to issue a Writ of Certiorari to resolve this conflict in the Courts of Appeals regarding their application of the *Marine Bank* analysis. *See* Supreme Court Rule 17.1(a).

B. This Court Should Review The Lower Court's Holding That Federal And State Court Jurisdiction Over Civil RICO Claims Is Concurrent

In the District Court, defendants contended in support of their motions to dismiss the Amended Complaints that the court should abstain from hearing plaintiffs' claims, primarily because of the existence of pending state court actions relating to the Maryland savings and loan crisis. Plaintiffs, in response, argued that abstention was improper because, *inter alia*, their RICO claims could not be asserted in the state court actions to which defendants referred, since federal courts have exclusive jurisdiction over RICO claims.[6]

6. This Court has held that abstention is improper under *Colorado River* when plaintiffs have alleged claims for which jurisdiction resides exclusively in the federal courts. *See Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 559-560 (1983). Moreover, numerous federal Courts of Appeals have held that abstention under one or more of the abstention doctrines elucidated by this Court is improper when claims are subject to exclusive federal jurisdiction. *See Finkielstain v. Seidel*, 857 F.2d 893, 896

Consequently, the District Court felt it necessary to determine whether jurisdiction over RICO claims is exclusively federal before it reached the merits of the abstention argument. The court found that jurisdiction over RICO claims is concurrent and, after considering the abstention issues, decided to abstain under *Colorado River* and *Burford*. The Court of Appeals for the Fourth Circuit affirmed the District Court's holding that jurisdiction over RICO claims is concurrent, then affirmed the District Court's decision to abstain under *Burford* only, based upon its prior decision in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988).[7]

Thus, the RICO jurisdiction issue is critical to the determination of the abstention issue in the actions below and in similar cases throughout the federal court system. Moreover, the exclusivity or non-exclusivity of federal court jurisdiction over RICO claims is an important question of federal law which has not yet been, but should be, settled by this Court. Finally, the federal

NOTES *(Continued)*

(2d Cir. 1988); *General Motors Corp. v. California State Bd. of Equalization*, 815 F.2d 1305, 1309 (9th Cir. 1987) (Kennedy, J.), *cert. denied*, 108 S. Ct. 1122 (1988); *Andrea Theatres, Inc. v. Theatre Confections, Inc.*, 787 F.2d 59, 62-63 (2d Cir. 1986); *Middle South Energy, Inc. v. Arkansas Public Service Comm'n*, 772 F.2d 404, 417 (8th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986); *United States v. Adair*, 723 F.2d 1394, 1402 n.5 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); *Cotler v. Inter-County Orthopaedic Ass'n*, 526 F.2d 537, 542 (3d Cir. 1975). *See also Kruse v. Snowshoe Co.*, 715 F.2d 120, 124 (4th Cir. 1983), *cert. denied*, 465 U.S. 1065 (1984); *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Ins. Co.*, 600 F.2d 671, 676 (7th Cir. 1979). *But see Kartell v. Blue Shield of Massachusetts, Inc.*, 592 F.2d 1191 (1st Cir. 1979).

7. *Brandenburg* was also based upon the failure of a non-federally-regulated state savings and loan association in Maryland. In *Brandenburg*, however, no federal securities law claim was asserted. Moreover, the allegations upon which plaintiffs' RICO claims in the instant actions are based differ significantly from the *Brandenburg* plaintiffs' claims.

Courts of Appeals are in conflict with each other on this issue, and also with numerous state appellate courts. Accordingly, Petitioners request this Court to grant a Writ of Certiorari pursuant to Supreme Court Rules 17.1(a) and 17.1(c).

1. The Question Whether Jurisdiction Over Civil RICO Claims Lies Exclusively With The Federal Courts Or Is Concurrent With State Courts Has Been The Subject Of Conflicting Decisions In The Federal Courts Of Appeals And Between Federal Courts Of Appeals And State Appellate Courts

a. The Conflict Among The Federal Courts Of Appeals

Three Federal Courts of Appeals have explicitly decided whether federal courts have exclusive jurisdiction over civil RICO claims or whether they share concurrent jurisdiction with the state courts. The Sixth Circuit has held that such jurisdiction lies exclusively with the federal courts, while the Fourth and Ninth Circuits have held that jurisdiction over RICO claims is concurrent.[8]

8. The Seventh Circuit has indicated in *dictum* that it is leaning toward finding concurrent jurisdiction. *See County of Cook v. MidCon Corp.*, 773 F.2d 892, 905 n.4 (7th Cir. 1985). *But see Washington Courte Condominium Association v. Washington Golf Corp.*, 150 Ill. App.3d 681, 501 N.E.2d 1290 (1986) (RICO jurisdiction exclusively federal); *Thrall Car Mfg. Co. v. Lindquist*, 145 Ill. App.3d 712, 495 N.E.2d 1132 (1986) (same).

Additionally, the Court of Appeals for the Fifth Circuit, in *Dubroff v. Dubroff*, 833 F.2d 557 (5th Cir. 1987), stated that, in its view, Texas courts would ultimately be likely to assume concurrent jurisdiction. *But see Main Rusk Associates v. Interior Space Constructors, Inc.*, 699 S.W.2d 305 (Tex. Ct. App. 1985) (RICO jurisdiction exclusively federal). *See also Hampton v. Long*, 686 F. Supp. 1202 (E.D. Tex. 1988) (refused to find concurrent jurisdiction in light of *Main Rusk*).

The Sixth Circuit

In *Chivas Products, Ltd. v. Owen,* 864 F.2d 1280 (6th Cir. 1988), the Court of Appeals for the Sixth Circuit found that jurisdiction over RICO claims is the exclusive province of the federal courts. In a detailed analysis, the court recognized that, while concurrent jurisdiction over civil causes of action created by federal statute is normally presumed under the rule of *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473 (1981), this presumption may be rebutted in a number of ways:

> Congress may confine jurisdiction of a federal claim to the federal courts either explicitly or implicitly "[1] by an explicit statutory directive, [2] by unmistakable implication from legislative history, or [3] by a clear incompatibility between state-court jurisdiction and federal interests."

Chivas, 864 F.2d at 1282 (quoting *Gulf Offshore,* 453 U.S. at 479).

Since Congress did not explicitly confer exclusive jurisdiction upon the federal courts in the RICO statute, the Sixth Circuit found the first of the three *Gulf Offshore* exceptions inapplicable. The court, however, held that a number of factors supported the conclusion that RICO jurisdiction is exclusive based upon the second and third *Gulf Offshore* exceptions.

First, the court found "considerable evidence in the legislative history" in support of exclusive jurisdiction, and stated that the sponsors of RICO "should be held to have intended an exclusively federal forum for civil RICO." 864 F.2d at 1283. The court based its conclusion primarily upon the undisputed fact that the drafters of the RICO statute "consciously borrowed the exact language of the Clayton Act in drafting the jurisdiction and venue sections for civil RICO." *Id.* (citations omitted). Since the language creating civil causes of action in RICO, 18 U.S.C. § 1964(c), is virtually identical to the corresponding language in the Clayton Act, 15 U.S.C.

§ 15(a), and jurisdiction over Clayton Act claims resides exclusively in the federal courts, the Sixth Circuit found this conscious parallel between RICO and the Clayton Act to be significant in determining that RICO jurisdiction is exclusively federal. *Id.* at 1284 (quoting *Agency Holding Corp. v. Malley-Duff & Associates,* 483 U.S. 143, 107 S. Ct. 2759, 2764-65 (1987); *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 489 (1985)).

Additionally, the Sixth Circuit held that the *Gulf Offshore* presumption of concurrent jurisdiction was rebutted by the "clear incompatibility between state-court jurisdiction and federal interests" reflected in RICO's statutory scheme. The court first noted that the civil remedy provided by section 1964(c) was "designed as an integral part of a broad-front attack on organized crime." 864 F.2d at 1284. Analyzing the statutory scheme as a whole, the court concluded that "features of the RICO structure are incompatible with concurrent state-court jurisdiction," since almost all of the RICO "predicate offenses" defined in section 1961(1) to constitute "racketeering activity" may be prosecuted only in the federal courts. *Id.* at 1285. The court explained that state courts have no jurisdiction to interpret or apply, and are generally unfamiliar with, the federal mail fraud, wire fraud and securities fraud offenses which constitute the predicate acts in the "great preponderance" of civil RICO cases. *Id.*

The Sixth Circuit also reasoned that the procedural provisions contained in RICO, which in some circumstances are applicable only to RICO actions brought in federal court, are inconsistent with any workable application of concurrent state court jurisdiction. *Id.* at 1285-86 (citing 18 U.S.C. §§ 1965-68.) Equally significantly, the Sixth Circuit noted that:

> [s]tate court jurisdiction over the complex and ambiguous RICO statute would create the possibility of

> conflicting interpretations not only in the 12 regional federal courts of appeals but also in 50 states.

Id. at 1285.

The Ninth Circuit

In *Lou v. Belzberg,* 834 F.2d 730 (9th Cir. 1987), *cert. denied,* 108 S. Ct. 1302 (1988) the Court of Appeals for the Ninth Circuit reached a contrary conclusion with respect to whether the *Gulf Offshore* presumption had been rebutted.[9] The Ninth Circuit found no "unmistakable implication" in RICO's legislative history that Congress intended jurisdiction to be exclusive. Moreover, the court rejected arguments that exclusive jurisdiction should be implied because of the conscious modelling of RICO upon section 4 of the Clayton Act, 15 U.S.C. § 15, finding that:

> Congress' mere borrowing of statutory language does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language.

Id. at 737.

Thus, the court was "not convinced" that the similarity between RICO and the Clayton Act supported an inference that RICO jurisdiction should also be exclusive. *Id.* [10] The court added that Congress' mandate for a liberal construction of RICO would be "hindered" if state courts were not permitted to hear RICO claims

9. *Lou* was decided in November, 1987, and represented the first decision by a federal Court of Appeals on the RICO exclusive jurisdiction issue. In *Chivas,* decided thirteen months later in December, 1988, the Sixth Circuit declined to follow either the rationale or the holding of *Lou.*

10. *Lou* was decided prior to this Court's decision in *Agency Holding Corp., supra,* in which the Court imported the Clayton Act's four-year statute of limitations into civil RICO because of the "clear legislative intent to pattern RICO's civil enforcement provision on the Clayton Act." 107 S. Ct. at 2765.

since, under such circumstances, potential plaintiffs could "not assert RICO claims that otherwise would have been joined with state law claims in state court." *Id.*

Moreover, the Ninth Circuit stated that there was no "clear incompatibility" between concurrent state court jurisdiction and federal interests under RICO because, *inter alia,* "RICO is not tied solely to federal laws," noting that certain state criminal violations may also constitute RICO predicate acts. *Id.* at 737-38. Additionally, because the court considered government enforcement actions and private civil damages actions under RICO to be "entirely distinct", it found "no reason to read the federalized aspects of the statute into" RICO's civil remedies provision. *Id.* at 738.

The Fourth Circuit

In *Brandenburg v. Seidel,* 859 F.2d 1179 (4th Cir. 1988), the case upon which the court below based its holding that jurisdiction over civil RICO claims is not exclusively federal, the Fourth Circuit followed reasoning similar to that utilized by the Ninth Circuit in *Lou v. Belzberg.*[11] The court held that the *Gulf Offshore* presumption was not rebutted, since it found no "unmistakable implication" of a congressional intent to provide for exclusively federal jurisdiction, nor any "clear incompatibility" between state court jurisdiction and federal interests. *Id.* at 1193-94.[12]

11. In both *Brandenberg* and the instant case, however, the Fourth Circuit failed to address this Court's analysis in *Agency Holding Corp.* of the similarity between RICO and the Clayton Act.

12. Lower federal courts in other circuits have reached similarly inconsistent results. *Compare Cacioppe v. Superior Holsteins III, Ltd.,* 650 F. Supp. 607 (S.D. Tex. 1986); *Spence v. Flynt,* 647 F. Supp. 1266 (D. Wyo. 1986); *Massey v. City of Oklahoma City,* 643 F. Supp. 81 (W.D. Okla. 1986); *Broadway v. San Antonio Shoe, Inc.,* 643 F. Supp. 584 (S.D. Tex. 1986); *Nordberg v. Lord, Day & Lord,* 107 F.R.D. 692 (S.D.N.Y. 1985); *Ideal Stencil Machine &*

Accordingly, Petitioners request that this Court issue a Writ of Certiorari to resolve the conflict between the federal Courts of Appeals on this issue. *See* Supreme Court Rule 17.1(a).

b. The Decisions Of State Appellate Courts Are Also In Conflict With The Decisions Of The Federal Courts Of Appeals

In addition to the conflicting decisions emanating from the federal Court of Appeals, a number of state courts of last resort and state intermediate appellate courts have also reached results that are inconsistent with each other and with the decisions of the federal Courts of Appeals.

Three state courts of last resort have expressly held that jurisdiction over RICO claims is concurrent. *See Cianci v. Superior Court,* 40 Cal.3d 903, 710 P.2d 375, 221 Cal. Rptr. 575 (1985); *Simpson Electric Corp. v. Leucadia, Inc.,* 72 N.Y.2d 450, 530 N.E.2d 860, 534 N.Y.S.2d 152 (1988); *Rice v. Janovich,* 109 Wash.2d 48, 742 P.2d 1230 (1987). Although no state court of last resort has explicitly held RICO jurisdiction to be exclusively federal, in *VanderWeyst v. First State Bank of Benson,* 425 N.W.2d 803 (Minn.), *cert. denied,* 109 S. Ct. 369 (1988), the Supreme Court of Minnesota

NOTES *(Continued)*

Tape Co. v. Merchiori, 600 F. Supp. 185 (S.D. Ill. 1985) (all finding exclusive federal court jurisdiction under RICO) *with Kim v. Pereira Enterprises, Inc.,* 694 F. Supp. 200 (E.D. La. 1988); *Village Improvement Ass'n v. Dow Chemical Co.,* 655 F. Supp. 311 (E.D. Pa. 1987); *Karel v. Kroner,* 635 F. Supp. 725 (N.D. Ill. 1986); *Chas. Kurz Co. v. Lombardi,* 595 F. Supp. 373 (E.D. Pa. 1984); *Luebke v. Marine National Bank,* 567 F. Supp. 1460 (E.D. Wis. 1983) (all finding concurrent jurisdiction). *See also Printing Mart-Morristown, Inc. v. Rosenthal,* 650 F. Supp. 1444 (D.N.J.) (refusing to decide jurisdictional issue but dismissing case on ground that plaintiff should have raised its RICO claims in prior state court action to avoid effect of New Jersey "claim preclusion" doctrine), *app. dism'd,* 833 F.2d 306 (3d Cir. 1987).

stated that it had "serious reservations" about assuming concurrent RICO jurisdiction. *Id.* at 812. Moreover, numerous state intermediate appellate courts have also decided this issue, with inconsistent results.[13]

Accordingly, this Court should review the decision of the court below to resolve the conflicts between and among the federal and state courts on this issue. *See* Supreme Court Rules 17.1(a), 17.1(c).

2. The Issue Whether RICO Jurisdiction Is Concurrent Or Exclusive Is An Important Question Of Federal Law Which Should Be Decided By This Court

As explained above, numerous federal and state courts have rendered decisions upon the exclusivity of federal court jurisdiction under RICO. These decisions comprise an irregular patchwork of decisional law that is wholly inconsistent with the purpose of RICO to provide a uniform and coherent statutory scheme to effectuate the federal interest in attacking and eradicating organized criminal activity. The widespread use of the civil RICO damages remedy requires more consistency and predictability in this vital area of the law.

Moreover, the current unsettled status of the RICO jurisdiction issue may have serious adverse consequences for litigants, some of which are graphically illustrated by the facts of the instant actions. The Court

13. *Compare Levinson v. American Accident Reinsurance Group,* 503 A.2d 632 (Del. Ch. 1985); *Thrall Car Mfg. Co. v. Lindquist,* 145 Ill. App.3d 712, 495 N.E.2d 1132 (1986); *Maplewood Bank & Trust Co. v. Acorn, Inc.,* 207 N.J. Super. 590, 504 A.2d 819 (1985); *Vickers v. Niesz,* No. 88-CA-28 (Ohio App. February 17, 1989); *Greenstein, Logan & Co. v. Burgess Marketing, Inc.,* 744 S.W.2d 170 (Tex. Ct. App. 1987); *Main Rusk Associates v. Interior Space Constructors, Inc.,* 699 S.W.2d 305 (Tex. Ct. App. 1985) (all finding exclusive federal jurisdiction) *with Hoke v. E. F. Hutton & Co.,* 91 N.C. App. 159, 370 S.E.2d 857 (1988); *Village at Camelback Property Owners Ass'n v. Carr,* 371 Pa. Super. 452, 538 A.2d 528, *appeal granted,* 548 A.2d 257 (Pa. 1988) (finding concurrent jurisdiction).

of Appeals for the Fourth Circuit, after deciding that RICO jurisdiction is concurrent and that plaintiffs could bring their claims in Maryland state court, affirmed the District Court's decision to abstain, in which the District Court *dismissed* – not merely stayed – plaintiffs' federal actions. The Maryland Court of Appeals, however, has never addressed the RICO jurisdiction issue. If that court subsequently determines that RICO jurisdiction is exclusive, plaintiffs such as Petitioners will be left with no forum in which to vindicate the rights created by Congress in this federal remedial statute.[14]

Such situations are even more likely to occur in the Fifth and Seventh Circuits, where state courts have already taken positions on the issue. The Seventh Circuit indicated in *County of Cook, supra,* that it might find RICO jurisdiction to be concurrent, but state courts in that Circuit have explicitly held that jurisdiction is exclusive.[15] Additionally, the Court of Appeals for the Fifth Circuit held in *Dubroff, supra,* that Texas courts would ultimately be likely to assume concurrent jurisdiction, despite a prior holding of a Texas intermediate appellate court that RICO jurisdiction is exclusive. *See Main Rusk, supra.* Moreover, a federal District Court in Texas expressly refused to find concurrent jurisdiction because of the contrary state court holding in *Main Rusk.*[16]

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14. At oral argument in the Fourth Circuit, counsel for defendants agreed that should this Court determine that RICO jurisdiction is exclusively federal, plaintiffs may reassert their RICO claims in federal court and the defendants will not raise any statute of limitations defense. Plaintiffs in other cases who have not obtained similar stipulations, however, may well lose their substantive rights under RICO if the statute of limitations expires prior to the dismissal of a RICO action by a court which determines that the action should have been brought in a different forum.

15. *See supra* note 8.

16. *See supra* note 8.

Finally, virtually all of the reported decisions on this issue have dealt with the same concerns – the application of *Gulf Offshore,* RICO's legislative history and similarity to the Clayton Act, the degree of compatibility between concurrent state court jurisdiction and the federal interests reflected in RICO, and the need for uniform interpretation and application of this far-reaching statute. Thus, the courts agree upon the factors that are determinative of this issue. The problem, however, is that in the absence of clear guidance by this Court, the lower federal courts and the state courts will continue to reach unpredictable and conflicting results based upon varying applications of the *Gulf Offshore* analysis. Therefore, a definitive ruling by this Court would clarify the current confusion surrounding this issue and restore order to the jumbled world of RICO jurisdictional jurisprudence. *See* Supreme Court Rule 17.1(c).

CONCLUSION

The lower court's misapplication of this Court's holding in *Marine Bank v. Weaver* is inconsistent with the analytic principles set forth in *Marine Bank* and with decisions of other federal Courts of Appeals analyzing *Marine Bank,* and presents an important federal question relating to the protection afforded to purchasers of financial instruments from institutions which are effectively unregulated and uninsured. Additionally, the issue whether jurisdiction over civil RICO claims is exclusively federal is an important federal question which is the subject of widely disparate and conflicting rulings throughout the federal and state court systems, and requires a definitive resolution by this Court.

Accordingly, Petitioners respectfully request this Court to issue a Writ of Certiorari to the Court of Appeals for the Fourth Circuit to review the questions presented herein.

Respectfully submitted,

M. Norman Goldberger
Brian P. Flaherty
*Gary L. Leshko
WOLF, BLOCK, SCHORR AND
SOLIS-COHEN
Twelfth Floor, Packard Building
15th and Chestnut Streets
Philadelphia, PA 19102-2678
(215) 977-2000
Attorneys for Petitioners

Of Counsel: **Counsel of Record*

Lawrence I. Weisman
306A Hampton Plaza
300 E. Joppa Road
Towson, Maryland 20204
(301) 583-9030

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3019L

FRANCINE TAFFLIN; SEYMOUR ZUCKERMAN; ERIS ZUCKERMAN; RENALEE SELVIN; JOAN ZUCKERMAN; SEYMOUR ZUCKERMAN, Executor of the Estate of Samuel Zuckerman; GEORGE R. LYON; GEORGE C. LYON; PETER M. LYON; BRUCE K. LYON; ELIZABETH A. LYON; GEORGE R. LYON; MARY G. LATHROP, Personal Representatives of the Estate of GEORGE M. LYON; KENT H. BUTCHER; STANLEY Z. FELSENBERG, M.D., Personal Representative of the Estate of Minnie Felsenberg; MARGARET GRAVES; THURMAN L. GRAVES; SANDRA L. PLETKA; GERTRUDE DURSO; ENTERPRISE EQUIPMENT CO., INC.; CARMEN R. GOLDINGS; CLELIA S. GOLDINGS; ETHAN D. GOLDINGS; HERBERT J. GOLDINGS, MD; SARAH M. GOLDINGS; DORIS KONIG; WINDELL R. CARTER; CATHERINE CARTER; MITCHELL W. LANDY, RIO GRANDE SAVINGS & LOAN ASSOC.,

Plaintiffs-Appellants

versus

JEFFREY A. LEVITT; LCP CORPORATION; ALLAN H. PEARLSTEIN; JEROME S. CARDIN; LIGHT STREET PARTNERSHIP; ALLEN FEINBERG; ROBERT D. PEARLSTEIN; SAMUEL SHOUBIN; DENNIS E. GUIDICE; KAROL LEVITT; ROSEMARY PEARLSTEIN; OLD COURT SAVINGS & LOAN, INC.; MARYLAND SAVINGS SHARE INSURANCE CORP.; MARYLAND DEPOSIT INSURANCE FUND CORPORATION; CHARLES C. HOGG, II; PAUL B. TRICE, JR.; GEORGE W. PIERSON, H.; JEROME F. DOLIVKA; FRANCIS F. ANDERSON; MICHAEL J, DIETZ; LEONARD BASS; JOHN C. DONOHUE, SR.; HENRY R. ELSNIC; JOHN D. FAULKNER, JR.; JAMES D. LAUDEMAN; TERRY L. NEIFELD; GLASS AND ASSOCIATES, P.A.; CARDIN AND CARDIN, P.A., VENABLE, BAETJER & HOWARD; DAVID UNFELDER,

Defendants-Appellees

LCP CORPORATION,

Defendant

No. 88-3020

FRANCINE TAFFLIN; SEYMOUR ZUCKERMAN; ERIS ZUCKERMAN; RENALEE SELVIN; JOAN ZUCKERMAN; SYLVIA ZUCKERMAN; SEYMOUR ZUCKERMAN, Executor of the Estate of Samuel Zuckerman; GEORGE R. LYON; GEORGE C. LYON; PETER M. LYON; BRUCE K. LYON; ELIZABETH A. LYON; GEORGE R. LYON; MARY G. LATHROP, Personal Representatives of the Estate of George M. Lyon; GERTRUDE DURSO; ENTERPRISE EQUIPMENT CO., INC.; CARMEN R. GOLDINGS; CLELIA S. GOLDINGS; ETHAN D. GOLDINGS; HERBERT J. GOLDINGS, MD; SARAH M. GOLDINGS; DORIS KONIG; WINDELL R. CARTER; CATHERINE CARTER; MITCHELL W. LANDY, RIO GRANDE SAVINGS & LOAN ASSOC.,

Plaintiffs-Appellants

versus

JEFFREY A. LEVITT; LCP CORPORATION; ALLAN H. PEARLSTEIN; JEROME S. CARDIN; LIGHT STREET PARTNERSHIP; ALLEN FEINBERG; ROBERT D. PEARLSTEIN; SAMUEL SHOUBIN; DENNIS E. GUIDICE; KAROL LEVITT; ROSEMARY PEARLSTEIN; OLD COURT SAVINGS & LOAN, INC.; MARYLAND SAVINGS SHARE INSURANCE CORP.; MARYLAND DEPOSIT INSURANCE FUND CORPORATION; CHARLES C. HOGG, II; PAUL B. TRICE, JR.; GEORGE W. PIERSON, H.; JEROME F. DOLIVKA; FRANCIS F. ANDERSON; MICHAEL J. DIETZ; LEONARD BASS; JOHN C. DONOHUE, SR.; HENRY R. ELSNIC; JOHN D. FAULKNER, JR.; DAVID UHLFELDER; JAMES D. LAUDEMAN; TERRY L. NEIFELD; GLASS AND ASSOCIATES, P.A.; CARDIN AND CARDIN, P.A., VENABLE, BAETJER & HOWARD,

Defendants-Appellees

LCP CORPORATION,

Defendant

Appeals from the United States District Court of Maryland, at Baltimore. Walter E. Black, Jr. District Judge. (CA-87-668; CA-87-684)

Argued: November 2, 1988 Decided: January 12, 1989

Before: WINTER, *Chief Judge,* and WIDENER and CHAPMAN, *Circuit Judges.*

M. Norman Goldberger (Brian P. Flaherty, Gary L. Leshko, WOLF, BLOCK, SCHORR AND SOLIS-COHEN; Lawrence I. Weisman on brief) for Appellants. David B. Isbell (Charles F. C. Ruff, Carol Fortine, COVINGTON & BURLINGTON on brief), Andrew H. Marks (Luther Zeigler, Elaine A. Panagakos, CROWELL & MORING; Ralph S. Tyler, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL; James P. Ulwick, KRAMON & GRAHAM; Paul D. Krause, Carol Ann Petren, Jayson L. Spiegel, JORDAN, COYNE, SAVITS & LOPATA; Aubrey M. Daniel, III, WILLIAMS & CONNOLLY; Robert W. Hesselbacher, Jr., LAXALT, WASHINGTON, PERITO & DUBUC; John H. Zink, III, COOK, HOWARD, DOWNES & TRACY; Ronald Shur, ANDERSON, BAKER, KILL & OLICK; Howard B. Possick, ARENT, FOX, KINTNER, PLOTKIN & KAHN; Jay I. Morstein, FRANK, BERNSTEIN, CONWAY & GOLDMAN; James A. Rothschild, ANDERSON, COE & KING; Daniel F. Goldstein, BROWN & GOLDSTEIN; Andrew Radding, BLADES & ROSENFELD, P.A.; Francis S. Brocato, BROCATO & KEELTY; Stephen C. Winter, WINTER & ASSOCIATES; Ronald W. Fuchs, ECCLESTON & SEIDLER; Harold H. Burns; Thomas G. Brodie, POWER & MOSNER on brief) for Appellees.

WINTER, *Chief Judge:*

These consolidated cases arise out of the failure of Old Court Savings & Loan, Inc. (Old Court), a state chartered savings and loan association, and the collapse of the Maryland Savings-Share Insurance Corporation

(MSSIC), a state-chartered non-profit corporation created to insure the accounts in Maryland savings and loan associations that did not have federal deposit insurance.

Plaintiffs, all non-residents of Maryland, are purchasers and holders of certificates of deposit of Old Court which, together with the interest thereon, are unpaid. Defendants are (a) the former officers and directors of Old Court, (b) the former officers and directors of MSSIC, (c) the law firm of Venable, Baetjer & Howard, counsel to MSSIC and Old Court, (d) Old Court's accounting firm, and (e) State of Maryland Deposit Insurance Fund Corporation (MDIF), the state-created successor to MSSIC.[1] Plaintiffs allege causes of action arising under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act (RICO), as well as state law claims.

The district court granted defendants' motions to dismiss on the grounds that plaintiffs had failed to allege a claim under the Securities Exchange Act of 1934 and that the district court should abstain from deciding the other alleged causes of action since they were all raised in pending litigation in the Circuit Court for Baltimore City.

Plaintiffs appeal and we affirm.

I.

In *Brandenburg v. Seidel,* 859 F.2d 1179 (4 Cir. 1988), we summarized the genesis of Maryland's savings and loan crisis, the steps taken by the Governor of Maryland and the General Assembly of Maryland to meet it, and the implementation of the legislative scheme by the designation of a single judge of the Circuit Court for Baltimore City to adjudicate all claims arising out of the conservator/receivership proceedings

1. The district court dismissed MDIF on Eleventh Amendment grounds and the correctness of its order is not challenged.

for failed savings and loan associations, including Old Court. Those facts need no repetition here.

Old Court, which was one of the first savings and loan associations to collapse, was placed into conservatorship on May 13, 1985 and withdrawals were immediately limited to no more than $1,000 for each consecutive 30-day period, with a few minor exceptions. On November 8, 1985 the conservatorship proceeding was converted into a receivership proceeding and MDIF was appointed receiver. MDIF has expressly stated that owners of certificates of deposit will not be compensated for interest accruing after November 8, 1985, and that for the period May 13 to November 8, 1985, interest will be paid at only the rates of 5½% per annum rather the higher rates prescribed in the certificates.

Since MDIF was appointed receiver, it has sued the former officers, directors and controlling persons of Old Court in the Circuit Court for Baltimore City alleging misdeeds closely paralleling those alleged in the instant case. In addition there are two overlapping depositor class actions against Old Court and its principals pending in that court. Finally, since the decision of the district court in the instant case, plaintiffs have filed a class action suit against defendants in the Circuit Court for Baltimore City alleging RICO and common law causes of action.

Two questions are presented by this appeal. We must decide first whether the certificates of deposit issued by Old Court are "securities" within the meaning of the Securities Exchange Act of 1934 so as to give rise to a cause of action on the facts alleged by the plaintiffs. Then we must decide, at least with respect to plaintiffs' alleged RICO cause of action, if the district court correctly concluded to abstain from decision and to dismiss the complaints.

II.

The Securities Exchange Act of 1934, 15 U.S.C. §78 *et seq.*, renders both unlawful and actionable fraudulent dealings in securities as alleged by plaintiffs. Jurisdiction is exclusively federal under the Act. The question here is whether the certificates of deposit issued by Old Court are "securities" within the meaning of that Act.

The Act defines "security" to mean, *inter alia*, "any note . . . bond, debenture . . . any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security; or in general, any instrument commonly known as a 'security' . . ." §78c(a)(10). Were we to confine ourselves to the statutory definition, we might well conclude that the certificates of deposit are "securities" as defined in the Act. However, as the Supreme Court has noted, these financial instruments "do not fit squarely within one of the enumerated specific kinds of securities listed in the definition." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 690 n.4 (1985).

In *Marine Bank v. Weaver*, 455 U.S. 551 (1982), the Court held that a long-term certificate of deposit issued by a bank insured by the Federal Deposit Insurance Corporation is not a "security" within the meaning of the Act. The rationale of *Marine Bank* was that the Act in defining the term "security" states that the definition is to be employed "unless the context otherwise requires." §78c(a). The Court concluded that the context did otherwise require when the certificate of deposit is issued by a federally insured bank because such a bank is "subject to the comprehensive regulations governing the banking industry," i.e., "[d]eposits in federally regulated banks are protected by the reserve, reporting, and inspection requirements of the federal banking laws; advertising relating to the interest paid on deposits is also regulated [and] deposits are insured by the Federal

Deposit Insurance Corporation." 455 U.S. at 558 (footnotes eliminated). As a consequence, since the Act states that the inclusiveness of the definition of security should be limited when the context requires, the Court concluded:

> It is unnecessary to subject issuers of bank certificates of deposit to liability under the antifraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under the federal banking laws. We therefore hold that the certificate of deposit purchased by [plaintiffs] is not a security.

455 U.S. at 559 (footnote omitted).

We read *Marine Bank* to hold that the existence of a comprehensive regulatory and insurance system governing the issuer removes certificates of deposit issued by it from the general definition of "securities" contained in the Act. Specifically, we agree with the district court that there was a comprehensive regulatory and insurance system applicable to Old Court so that its certificates of deposit did not fall within the statutory definition. Maryland law vested supervisory authority over state-chartered savings and loan associations in the Director of the Division of Savings and Loan Associations, Md. Fin. Inst. Code. Ann. §8-303 (1980), and the Board of Savings and Loan Commissioners, *id.* §8-207. Deposits in the MSSIC member associations, of which Old Court was one, were insured by MSSIC, *id.* §10-103.

State statutes required Maryland chartered associations to maintain reserve accounts, *id.* 9-219, 9-327 (1980), to comply with periodic reporting, inspection and audit requirements, *id.* §§9-502-9-504, and conduct promotional activities in accordance with regulations promulgated by the Board of Savings and Loan Commissioners, *id.* §9-905. These statutes were supplemented by rules and regulations established by the Division of

Savings and Loan Associations as well as rules and regulations adopted by MSSIC and approved by the Division.

We recognize of course that in the case of Old Court and others, the Maryland system viewed in hindsight was ineffective. Whether the holders of Old Court's certificates of deposit will ever be paid in full is problematic even though Maryland has required the accumulation of interest thereon to be reduced. But we do not think that *Marine Bank* depends upon the effectiveness of the regulatory scheme as it may have been administered. " '[T]he nature of an instrument is to be determined at the time of issuance, not at some subsequent time' ", West v. Multibanco Commerex, S.A., 807 F.2d 820, 826 (9 Cir. 1987) (quoting Great Western Bank & Trust v. Katz, 532 F.2d 1252, 1255 (9 Cir. 1976)). At the time Old Court issued the certificates of deposit giving rise to this litigation, there had been no break down in Maryland's then regulatory scheme, and neither Old Court nor MSSIC was insolvent.

It is significant also that *Marine Bank* did not depend upon the complete effectiveness of the federal scheme. The failure of national banks, federally insured banks, federally chartered savings and loan associations, and federally insured savings and loan associations was known before and has been known after *Marine Bank* was decided. At the time *Marine Bank* was decided the maximum federal insurance was only $40,000 while the certificate of deposit in issue in that case was for $50,000, and Congress had not yet seen fit to place the government's full faith and credit behind the federal insurer.

Thus, we conclude that application of *Marine Bank* depends upon the comprehensiveness of the scheme of regulation, and by that test we think that the Maryland system qualified to render the certificates of deposit not "securities." There is also a practical reason for this conclusion. As the district court said:

> The Court is convinced that the Supreme Court did not intend to have lower courts engaging in an inquiry as to whether, at the time a given CD is issued, the regulatory and insurance schema in place was sufficiently well managed or well positioned to contend with a crisis that the CD should not be treated as a security. Such an inquiry could potentially lead to a court concluding that the same bank could one year issue a CD that was not a security, but that due to a change in effectiveness of the regulatory, insurance protection, the next year an identical CD would be a security.

We hold therefore that plaintiffs have no cause of action under the Securities Exchange Act of 1934 because the certificates of deposit owned by them are not "securities" within the meaning of the Act.

III.

The correctness of the district court's decision to abstain from deciding plaintiffs' RICO claims and to dismiss this aspect of the complaint warrants little discussion.

Subsequent to the district court's decision, we decided Brandenburg v. Seidel, *supra*. There we held with regard to First Maryland Savings and Loan Association, like Old Court, a financial institution which failed as part of the Maryland savings and loan debacle, that a RICO action could be instituted in a state court and that Maryland's "comprehensive scheme for the rehabilitation and liquidation of insolvent state-chartered savings and loan associations," 859 F.2d at 1191, provided a proper basis for the district court to abstain under the authority of Burford v. Sun Oil Co., 319 U.S. 315 (1943).

We view *Brandenburg* as controlling here.[2]

AFFIRMED.

2. The holding in *Brandenburg* that state courts have jurisdiction of RICO actions is not one which has yet been determined by the Supreme Court. Counsel in the instant case agreed in oral argument that should this aspect of *Brandenburg* be overruled by the Supreme Court at some later date, plaintiffs may reinstate their RICO cause of action in the district court and defendants will not assert the defense of limitations.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MARYLAND

FRANCINE TAFFLIN, SEYMOUR ZUCKERMAN, ERIS ZUCKERMAN, RENALEE SELVIN, JOAN ZUCKERMAN, SYLVIA ZUCKERMAN, SEYMOUR ZUCKERMAN, GEORGE R. LYON, GEORGE C. LYON, PETER M. LYON, BRUCE K. LYON, ELIZABETH A. LYON, GEORGE R. LYON and MARY G. LATHROP (personal representatives of the estate of George M. Lyon), KENT H. BUTCHER, STANLEY Z. FELENSBERG, M.D. (personal representative of the estate of Minnie Felsenberg), MARGARET GRAVES, THURMAN GRAVES, SANDRA L. PLETKA	:	
plaintiffs	:	
– vs –		
JEFFREY A. LEVITT, LCP CORPORATION, ALLAN H. PEARLSTEIN, JEROME S. CARDIN, LIGHT STREET PARTNERSHIP, ALLEN FEINBERG, DAVID UHLFEDLER, ROBERT D. PEARLSTEIN, SAMUEL SHOUBIN, DENNIS E. GUIDICE, KAROL LEVITT, ROSEMARY PEARLSTEIN, OLD COURT SAVINGS AND LOAN, INC., MARYLAND SAVINGS SHARE INSURANCE CORP., MARYLAND DEPOSIT INSURANCE FUND CORP., CHARLES C. HOGG, II, PAUL R. TRICE, JR., GEORGE W.H. PIERSON, JEROME F. DOLIVKA, FRANCIS F. ANDERSON, MICHAEL J. DIETZ, LEONARD BASS, JOHN C. DONOHUE, SR., HENRY R. ELSNIC, JOHN D. FAULKNER, JR., JAMES D. LAUDEMAN, TERRY L. NEIFIELD, GLASS AND ASSOCIATES, P.A., CARDIN CARDIN, P.A.	:	DOCKET NO.: B87-668-684
	:	Baltimore, Maryland
	:	December 4, 1987
	:	3:40 p.m.
defendants	:	

PARITAL TRANSCRIPT OF RECORDED PROCEEDINGS

BEFORE THE HON. WALTER E. BLACK
UNITED STATES DISTRICT JUDGE

AUDIO OPERATOR: V. CAMERON

PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING; TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE

APPEARANCES

For the Plaintiffs:	JUDITH R. COHN, ESQ. BRIAN P. FLAHERTY, ESQ. LAWRENCE I. WEISMAN, ESQ.
[redacted]nable, Baetjer & Howard	WILLIAM J. O'BRIEN, ESQ. CHARLES F. C. RUFF, ESQ. DAVID B. ISBELL, ESQ. MARK H. LYNCH, ESQ.
Robert D. Pearlstein	STEVEN A. ASHER, ESQ.
Glass & Associates, P.A.	JAMES LEWIS GRIFFITH, ESQ. RONALD W. FUCHS, ESQ. AMY HEINRICH TIDEY, ESQ.
Jeffrey A. Levitt, Karol Levitt, LCP Corporation	PAUL N. SANDLER, ESQ.
Allan H. Pearlstein Rosemary Pearlstein	ANDREW J. GRAHAM, ESQ. JAMES P. ULWICK, ESQ.
Maryland Deposit Ins. Fund Corporation	DEBORAH L. ROBINSON, ESQ. SHALE D. STILLER, ESQ. JAY I. MORSTEIN, ESQ. RALPH S. TAYLOR, ESQ.
Leonard Bass, Michael J. Deitz, Jerome Dolivka, Henry R. Elsnic	JOHN F. STOVIAK, ESQ. WILLIAM R. HANLON, ESQ. ANDREW H. MARKS, ESQ.

Denice Guidice	STANLEY J. SINOWITZ, ESQ. ANDREW RADDING, ESQ.
Paul V. Trice, Jr.	FRANCIS S. BROCATO, ESQ.
Francis F. Anderson John C. Donohue, Sr.	STEPHEN C. WINTER, ESQ. T. BRUCE HANLEY, ESQ.
James D. Laudeman	WILLIAM F. MOSNER, ESQ. THOMAS G. BODIE, ESQ.
For the Defendants:	GEORGE P. PIERCE, ESQ.
Leonard Bass, Michael J. Deitz, Jerome Dolivka, Henry R. Elsnic	ANDREW H. MARKS, ESQ.
Charles C. Hogg, III	JOHN H. ZINK, III, ESQ.
Jerome Cardin & Cardin & Cardin, P.A.	ROBERT R. REEDER, ESQ.
	AUBREY M. DANIEL, III, ESQ. JOHN K. VILLA, ESQ. SETH J. CHANDLER, ESQ. STEVEN D. RABER, ESQ.
	PAUL D. DRAUSE, ESQ. CAROL ANN PETREN, ESQ. JAYSON L. SPIEGEL, ESQ.
Allen Feinberg	MITCHELL A. KRAMER, ESQ. ROBERT W. HESSELBACHER, ESQ.
Terry L. Neifield	HAROLD H. BURNS, JR., ESQ. MAUREEN MACKEY, ESQ.
LCP Corp.	PAUL MARK SANDLER, ESQ. BRYAN D. BOLTON, ESQ.
David Uhlfedler	MICHAEL F. KRAEMER, ESQ. PETER J. MOONEY, ESQ.
James Laudeman	WILLIAM F. MOSNER, ESQ.
George W.H. Pierson	JEROLD OSHINSKY, ESQ. ROBERT H. SCHULMAN, ESQ
John D. Faulkner	HOWARD B. POSSICK, ESQ.

(Transcript of Court's opinion)

THE COURT: Good afternoon. Thank you all for returning. As I indicated before the recess. I am going to rule on these matters today by means of an informal oral opinion reserving the right to edit that opinion if it's transcribed for any reason.

The Court today has heard argument on three of the issues raised in the many motions to dismiss filed by virtually all of the Defendants in the two cases. The issues argued were (1) whether Plaintiffs have stated a claim upon which relief can be granted under the Securities Exchange Act of 1934: (2) whether Plaintiffs have stated a claim upon which relief can be granted under the Raceteer Influenced and Corrupt Organization Act and (3), whether the Court should dismiss the actions on abstention grounds.

The two actions before the Court were commenced by complaints filed on January 7, 1986, in the United States District Court for the Eastern District of Pennsylvania. On February 28, 1986, Judge James T. Giles ordered that the two cases be consolidated for the purpose of pretrial motions. On March 11, 1986, the two complaints were amended. On February 17, 1987, the consolidated cases were transferred to this Court.

The primary difference between the two complaints is that the Plaintiffs in Civil Action B-87-668 who are residents of Maryland are not Plaintiffs in Civil Action B-87-684, and that because Plaintiffs claim that all Defendants are Maryland residents, diversity jurisdiction along with federal question jurisdiction is asserted in B-87-684. All of the named Plaintiffs in both actions claim to be purchasers of Old Court Savings and Loan, Inc. certificates of deposit, who purchased or renewed these certificates between September, 1982 and May 13, 1985, all Plaintiffs also claim to have still held these securities, — oh, wow, that's a terrible mistake to make, — these certificates on May 13, 1985, when Old Court went into conservatorship, except that certain Maryland

Plaintiffs claim to have redeemed their certificates on or about May 9, 185, and suffered a penalty for early withdrawal. Having now noted the only distinctions between the two actions, for simplicity's sake the actions will be treated as one action for the purpose of discussion.

Plaintiffs assert claims under federal securities law (count 1), RICO (counts 2 and 3) and state law (counts 4 through 9). Plaintiffs seek compensatory, treble and punitive damages, costs, and fees for attorney's, accountants and experts from 29 separate Defendants. All Plaintiffs allege that the actions of the Defendants have deprived Plaintiffs of their money and the interest owing on that money. Certain Maryland Plaintiffs allege that Defendants actions forced them to seek early withdrawal of their money and sustain a penalty, while the remainder of the Plaintiffs allege that their money was in Old Court's possession at the Old — at the time Old Court went into conservatorship and that they have been deprived of that money. Plaintiffs have moved for class certification, purporting to represent all persons who purchased Old Court certificates of deposit between September 1, 1982 and May 13, 1985: and who either held such certificates on May 13, 1985, or who redeemed such certificates immediately prior thereto had suffered a penalty for early withdrawal.

It is critical to the resolution of the motions before the Court to understand what has been happening in the State of Maryland for the last two and a half years regarding the so-called "savings and loan crisis." In early May of 1985, a rumor broke out concerning the financial instability of Old Court. The rumor triggered a run at Old Court and a number of other savings and loans in Maryland. On May 13, 1985, the Maryland Saving Share Insurance Corporation ("MSSIC"), the private insurer of Maryland's' savings and loans, was made the conservator of Old Court by the Circuit Court for Baltimore City. On

May 14, 1985, then Governor Hughes issued an Executive Order declaring a state of public crisis and an emergency. Governor Hughes's order limited withdrawals from all MSSIC-insured savings and loans to a maximum of $1,000 per account, per thirty day period.

Upon Governor Hughes' order, the Maryland General Assembly sat for two special sessions between May 17 and May 28, 1985 and between October 17 and November 5, 1985, to enact emergency legislation. The legislation, – the legislature responded by passing a number of laws to contend with the crisis. See generally Maryland Financial Institution Code Annotated 9-109, – 9-101 to 10-119. Central to the legislative effort was the creation of the Maryland Deposit Insurance Fund ("MDIF"), a state-run savings and loan insurer. Section 10-102. Of particular importance to the case at bar are the sections of the emergency legislation that provide for MDIF to be appointed as conservator or receiver of troubled savings and loans and which provide for the jurisdiction and powers of the Maryland circuit court in administering the conservatorship or receivership. Sections 9-709 to 9-711.

MDIF, as the successor in interest to MSSIC, became the conservator of Old Court. Judge Joseph H. H. Kaplan of the Circuit Court for Baltimore City was assigned the matter of the Old Court conservatorship, and subsequently the Court of Appeals in Maryland made Judge Kaplan the one judge to adjudicate all disputes arising out of the receivership or conservatorship proceedings of Maryland Savings and Loan Associations. On November 5, – on November 8, 1985, Judge Kaplan converted the Old Court conservatorship proceeding into a receivership proceeding.

Of significance are two ongoing law suits before the Circuit Court for Balitmore City that were initiated prior to the case at bar. On June 6, 1985, some of the plaintiffs in this case, Thurman L. Graves, Margaret L. Graves and Sandra Pletka filed suit (hereafter referred to as the

Graves suit) against a number of Defendants in this case. The suit, while lacking a federal securities claim and a RICO claim, bears a very strong resemblance in terms of wrongs alleged to this case. Moreover, a class action has been certified in the Graves suit with the class consisting of "all persons presently owning certificates, savings accounts, PA accounts, checking accounts and other forms of investments issued by Old Court." All Plaintiffs in this case, therefore, can be members of the Plaintiff class in the Graves sit. A suit has also been brought by MDIF in its capacity as conservator of Old Court against Old Court's officers, directors, stockholders, lawyers, controlling persons, subsidiaries and affiliates, many of whom are Defendants herein. The suit asserts many of the state law claims asserted in the case before this Court. More recently, MIDIC has brought a separate action as Old Court's receiver against the former MSSIC officers and directors.

Having detailed the procedural history of this case and the regulatory actions taken by the State of Maryland through all three of its branches of government in the wake of the collapse of Old Court, the Court now turns its attention to the issue of whether Plaintiffs have stated a claim upon which relief can be granted under the Securities Act. The answer to this question is entirely dependent on the answer to another question: are the certificates of deposit purchased by Plaintiffs from Old Court securities?

Whether an instrument is a security or not under the Securities Exchange Act of 1934 is a matter of statutory interpretation. While the definition of security in the Act is quite broad and was clearly intended to cover a wide range of financial instruments, it is unclear from the face of the statute and from the legislative history whether certificates of deposit were intended to be construed as securities. Of course, the court is referring to 15 United States Code Section 78c(a)(10). The Court's analysis of the problem begins with the

Supreme Court decision in *Marine Bank v. Weaver,* 455 U.S. 551 (1982), which both sides argue as being dispositive in favor of their respective positions.

In *Weaver* the Supreme Court was faced with the question of whether certificates of deposit, – of deposit issued by a federally regulated bank and insured by the Federal Deposit Insurance Corporation (FDIC) are securities under the Securities Exchange Act of 1934. The Supreme Court approached the issue by noting first that the Court of Appeals had concluded that a certificate of deposit is similar to any other long-term debt obligation commonly found to be a security. The Supreme Court plainly disagreed with this conclusion, at least with respect to certificates of deposit from federally regulated banks.

Quoting, the Court of Appeals also concluded that a certificate of deposit is similar to any other long-term debt obligation commonly found to be a security. In our view, however, there is an important difference between a bank certificate of deposit and other long-term obligations. This certificate of deposit was issued by a federally regulated bank which is subject to the comprehensive set of regulations governing the banking industry. Deposits in federally regulated banks are protected by the reserve, reporting, and inspection requirements of the federal banking laws, advertising relating to the interest paid on deposits is also regulated. In addition, deposits are insured by the Federal Deposit Insurance Corporation. Since it's formation in 1933, nearly all deposits in failing banks insured by the FDIC have received payment in full, even payment for the portions of their deposits above the amount insured. We see, therefore, important differences between a certificate of deposit purchased from a federally regulated bank and other long-term obligations.

Quoting from page 558 and 559. The importance of these differences, according to the Supreme Court, is that the purchaser of a certificate of deposit from a

federally regulated, federally insured bank, quote, is virtually guaranteed payment in full, whereas the holder of an ordinary long term debt obligation assumes the risk of the borrower's insolvency. Quoting again from page 559.

The Supreme Court then went on to explain why this disparity in risk between federally regulated and insured certificates of deposit and ordinary long term debt obligations affected the issue of whether the certificate of deposit at issue in *Weaver* was a security.

Quoting, the definition of security in the 1934 Act provides that an instrument which seems to fall within the broad sweep of the Act is not to be considered a security if the context otherwise requires. It is unnecessary to subject issuers of bank certificates of deposit to liability under the antifraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under the federal banking laws. We therefore hold that the certificate of deposit purchased by the Weavers is not a security.

The Supreme Court's determination that the context of federal banking law regulatory and insurance protection for the certificate of deposit in question brought an instrument which it hinted, quote, seems to fall within the broad sweep of the Act and therefore seems to be a security, outside of the sweep of the Act and therefore not a security, represents a new approach to the often litigated issue of whether a particular instrument is a security. Prior to the *Weaver* decision, the Court limited its review to whether the instrument itself fell within the ordinary concept of a security, as contemplated in the 1934 Act. See United States,– *United Housing Foundation v. Forman,* 421 U.S. 837 (1975). *SEC versus United Benefit Life Insurance,* 387, U.S. 202 (1967)

It is important to recognize that in *Weaver* the Supreme Court did not face the question of whether,

federal regulatory and insurance context aside, certificates of deposit are securities. Instead the Court opted to proceed directly to the analysis of whether context otherwise required,– I've lost my place. Well, strike that sentence. The Court did not say that were it not for the context of federal regulation and insurance, a certificate would be a security nor did the Court say that all certificates of deposit were securities. The Court did leave the following telling footnote: "It does not follow that a certificate of deposit invariably falls outside the definition of a security as defined by the federal statutes. Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question. The purposes intended to be served and the factual setting as a whole. Quoting from the footnote number eleven of page 561.

Since the *Weaver* decision, a number of lower federal courts have made determinations whether particular certificates of deposit are securities. See *Wolf versus Banco Nacional de Mexico, S.A.,* 739 F.2d 1458 (9th Circuit 1984); Cert. Denied 469 U.S. 1108; *Brockton Savings Bank v. Peat, Marwick, Mitchell and Company;,* 577 F.Supp. 1281 (District of Massachusetts 1983). In both *Wolf* and *Brockton Savings,* the courts found the *Weaver* decision to be controlling, and held that the certificates of deposit were not securities. In *Brockton Savings* the material facts were essentially the same as those in *Weaver;* the certificate of deposit was issued by a federally regulated bank insured by the FDIC. In *Wolf,* however, the court was faced with a certificate of deposit issued by a Mexican bank. The court in *Wolf* concluded that the crux of the Supreme Court decision in Weaver was the Court's conclusion that repayment of the certificate of deposit was virtually guaranteed due to the comprehensive regulation and that the Court did not limit its holding to the context of federal regulation. Thus, upon finding that the Mexican government's regulations provide holders of certificates

of deposit from Mexican banks with as much protection as does the federal system in this country the court held the Mexican issued certificates of deposit were not securities.

The only post *Weaver* case known to the Court where it was determined that the certificate of deposit in question was a security is *Gary Plastic Packaging Corporation versus Merrill Lynch, Pierce, Fenner & Smith,* 756 F.2d 230 (2d Circuit 1985). The plaintiff in *Gary Plastic* brought an action against an investment firm through which the Plaintiff had invested in a number of certificates of deposit. Merrill Lynch had an established CD program where it arranged to have banks create new CD offerings that carried interest rates lower than those they paid their direct customers and from this differential Merrill Lynch received a commission for its services which it used in part to cultivate a secondary market of borrowers. The investment purchased through Merrill Lynch had a fluctuating interest rate, depending on the Merrill Lynch's ability to orchestrate the selling of money to numerous banks. Thus, the court concluded that unlike a conventional CD, the success of the CD's bought through Merrill Lynch depended in part on Merrill Lynch's managerial expertise.

Faced with these facts and the question of whether the CD's purchased by Merrill Lynch for its investors were securities, the court applied the *Weaver* decision as Plaintiff would have this court do. After concluding that the similarity of the facts in the two cases mandated that *Weaver* be dispositive of the issue of whether the CDs were securities, the court held that because there was a significant risk of loss in investing in Merrill Lynch's CD program, unlike the CD in issue in *Weaver,* the CDs must be construed as securities. And while the court also concluded that the CDs at issue were securities under a more conventional analysis, the courts opinion centered on its construction of the holding in *Weaver.* Siting pages 238 to 242.

This Court cannot accept the construction of the holding in *Weaver* reached by the Second Circuit in *Gary Plastic*. It does not appear from the *Weaver* decision that the Supreme Court contemplated lower courts determining whether a CD is or is not a security solely on the basis of the risk of the investment. The Supreme Court established that a secure regulatory and insurance scheme was a context that mandated that a CD protected by such a scheme is not a security. The Court simply did not say that in the absence of such a scheme a CD is a security.

In *Burrus, Cootes and Burrus versus MacKethan,* 537 F.2d 1262, affirmed on rehearing, 5454 F.2d 1388 (4th Circuit 1976) *Cert. denied,* 434 U.S. 1018, the Fourth Circuit was faced with the issue of whether a certificate of investment issued by a savings and loan corporation was a security under the 1934 Act. In an opinion written by Senior District Judge Wyzanski, sitting by designation, the Fourth Circuit found the certificates of investment, a term of art used officially by the State of Virginia to describe a set of financial instruments to be essentially the same things as a passbook account or a certificate of deposit, in that the certificate, quote, embodies a contract by the corporation to pay interest at a fixed rate, unrelated to the profits of the corporation. Quoting from page 1264.

Having equated the certificate of investment with a certificate of deposit, Judge Wyzanski went on to analyze whether a certificate by either name, given their like characteristics, was a security under the 1934 Act. The court found the following passage from the Fifth Circuit opinion of *Bellah v. First National Bank,* 495 F.2d 1109 (5th Circuit 1974) to be persuasive.

Quote, Section 78c(a)(10) of the Securities Exchange Act of 1934 includes as security a certificate of deposit, for security. Under the judicial gloss placed on this language, a certificate of deposit issued in exchange for currency is not encompassed with in the section

because currency is not a security. Quoting from page 1264 and in turn quoting from *Bellah,* page 1114.

In addition to accepting this construction of the 1934 Act, Judge Wyzanski offered the following reasoning.

A certificate of deposit is far more like commercial paper than any other obligation. Not only is it payable in dollars according to its terms either on demand or at a fixed future date, but what the payee receives is principal and interest at a stipulated rate. In no aspect is the obligation keyed to the profitability of the obligor's enterprise or to his skill. Were a certificate of deposit to be treated as a security there would be superimposed on an already existing pattern of federal or state banking or like regulations which govern banks, trust companies, savings and loan associations, and other institutions for deposit of currency, a further, and perhaps not wholly suitable, patterns of regulations by the SEC. There is no indication in the text of the statute, nor in a Congressional committee report, nor even in a legislator's speech on the floor that Congress intended to provide for an overlap with all its risks of inter-agency conflict and of the SEC's want of specialized relevant expertise in this particular field of banking. Quoting from 1265. Accordingly, the Fourth Circuit in *Burrus, Cootes* found that the certificate of investment at issue were not a security under the 1934 Act.

The Court must decide whether the Supreme Court's decision in *Weaver* requires a different outcome than that reached by the Fourth Circuit in *Burrus, Cootes*. For absent in the *Weaver* decision, the holding in *Burrus, Cootes* would clearly be controlling authority in the present case. As discussed earlier in the opinion, the Supreme Court never reached the question of whether, excluding the regulatory and insurance context, a certificate of deposit is a security, although the Court did hint that a CD fell within the broad sweep of the act. As evidence by its final footnote, the Supreme

Court apparently intended to confine the direct holding of *Weaver* to its facts; that a CD issued by a federally regulated, FDIC insured bank is not a security. Footnote eleven instructs that other instruments, like the instruments in question in this case, be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole. Such an inquiry, this Court maintains is precisely what Judge Wyzanski undertook in *Burrus, Cootes*. Thus, it is the opinion of this Court that the holding in *Burrus, Cootes* remains good law, at least for the purposes of this case. After the Supreme Court decision in *Weaver,* and it is therefore controlling authority on the issue of whether the CDs at issue in this case are securities. The fact that the CDs in the present case may have been marketed in a more aggressive manner than is typical or the fact that Old Court was using the money it received from CD purchasers for unconventional purposes, does not alter the impact of the Fourth Circuit's analysis in *Burrus, Cootes* which focused on the nature of the intrinsic nature of the instrument. Thus, because the CDs in issue are not securities under the Securities Exchange Act of 1934, Plaintiff's securities claim in count one of the complaint will be dismissed.

In the alternative, the Court also holds that the CDs at issue are not securities, and therefore the federal securities claim must be dismissed, on the theory that the *Weaver* opinion, itself, is properly read to mandate that the Old Court CDs are not securities. The Court accepts the interpretation of *Weaver* offered by the Defendants that a CD is not a security, if, at the time it is issued, the bank, or in this case the savings and loan, is regulated and insured in a manner not unlike the federal system. Referring to *West v. Multibanco Comermex, S.A.,* 807 F.2d 820 (9th Circuit, 1987). The Court is convinced that the Supreme Court did not intend to have lower courts engaging in an inquiry as to whether

at the time a given CD is issued, the regulatory and insurance schema in place was sufficiently well managed or well positioned to contend with a crisis that the CD should not be treated as a security. Such an inquiry could potentially lead to a court concluding that the same bank could one year issue a CD that was not a security, but that due to a change in effectiveness of the regulatory, insurance protection, the next year an identical CD would be a security.

Having dismissed the securities claim, the Court will proceed directly to the issue of abstention rather than engage in an analysis of the validity of the RICO claims For the Court is of the opinion that the state courts enjoy concurrent jurisdiction over RICO claims, thus making abstention a far more viable option. Courts are divided on the issue, but his Court adopts the view arrived at by Judge Smalkin in his detailed analysis of the subject in *Brandenburg v. First Maryland Savings and Loan*, 660 F. Supp. 717 (District of Maryland 1987). The law presumes that the state courts enjoy concurrent jurisdiction over federal claims unless Congress dictates otherwise, either directly or indirectly, or unless there is a clear incompatibility between the exercise of state court jurisdiction and federal interest *Gulf Offshore Oil Company versus Mobil Oil Company*, 453 U.S. 473,– 478 (1981). Because there is nothing in the statutory language or the legislative history of RICO that can be interpreted to exclude the state courts from jurisdiction over RICO claims and no clear incompatibility with federal interests, the Court sees no reason to rebut the presumption of concurrent jurisdiction. I am referring to *Brandenburg*, 660 F. Supp. at 730 through 734; *HMK Corporation v. Walsy,* 637 F. Supp. 710 (Eastern District of Virginia 1986)

Defendants argue that the Court should abstain from hearing the case at bar in accordance with the following three abstention doctrines: *Burford* abstention, as set forth,– first set forth in *Burford versus Sun*

Oil Company, 319 U.S. 315 (1943); *Colorado River* abstention, as first set forth in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976); the *Younger* abstention, as first set forth in *Younger v. Harris*, 401 U.S. 37 (1971). The Court will address each of the three doctrines in turn.

Under *Burford* abstention, a federal court should abstain from exercising jurisdiction where to do so would result in unwarranted friction with the state administration of purely local affairs. Quoting from *Burford*, at 332. As the Fourth Circuit recently noted, the salient feature in *Burford* was that in addition to extensive state regulation of a field, the State has established its own elaborate review system for dealing with the geological complexities to, – of oil and gas fields by concentrating judicial oversight in specially authorized state courts. *Education Services, Inc. v. Maryland State Board for Higher Education*, 710 F.2d 170, 173 (4th Circuit 1983), quoting *Colorado River*, at page 815).

In the present case Defendants assert that to allow Plaintiffs to proceed in federal court against Defendants who either are already involved in the ongoing Old Court receivership proceedings in state court or who will potentially become involved would disrupt the complex regulatory scheme imposed by the Maryland State Assembly and the state judiciary. This Judge was held once before that *Burford* abstention was appropriate in light of the regulatory framework created by the State Assembly and the consolidation efforts made by the state judiciary to contend with the savings and loan crisis and its aftereffects, see *Northern Virginia Law School, Inc. v. Harry Hughes*, B-85-2300 (District of Maryland November 22, 1985), and the Court sees no reason to reach a different conclusion in this case. In the present case MDIF, Old Court's receiver, in accordance with the emergency legislation has brought law suits in state court against the directors of Old Court and more

recently against the former directors of MSSIC. Thus, a large number of Defendants in this case are Defendants in the state court suits filed by MDIF. If the Plaintiffs are allowed to proceed in this action, they will have circumvented the receivership process. Moreover, any money awarded to Plaintiffs would potentially reduce the available funds to satisfy a judgment in favor of depositors in the receiver proceeding. And the Court was referring once again to the *Brandenburg* opinion of page 729.

This Court is also of the opinion, as it was in *Northern Virginia Law School*, that as an alternative basis of abstention the Court should abstain from consideration of this case under *Colorado River* abstention. Under *Colorado River* abstention, as recently expanded upon in *Moses H. Cone Memorial Hospital versus Mercury Construction Company, – Corporation*, 460 U.S. one (1983), a federal court considering abstaining on the grounds of wise judicial administration in light of pre-existing state court proceedings should take the following factors into account: (a) the assumption by a state court of jurisdiction over property; (b) the inconvenience of the federal forum; (c) the avoidance of piecemeal litigation; (d) the order in which concurrent forums obtained jurisdiction; (e) whether the source of law is federal or state; and (f) the adequacy of the state court proceedings to protect the federal plaintiff's rights. See also, *Kruse v. Snowshoe Company*, 715 F.2d 120, 123 (4th Circuit 1983). The Supreme Court has offered the following methodology for employing these factors:

The decision whether to dismiss a federal action because of parallel state court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighed in favor of the exercise of jurisdiction. The weight to be given to any one factor may vary greatly from case to case, depending on the particular setting of the case. Quoting from *Cone*, at page 17.

Applying these factors, it is apparent that only factor (e) weighs against abstention, in that one of the claims asserted by the Plaintiffs is a federal claim. Because the Court has ruled that federal courts do not have exclusive jurisdiction over RICO claims, and because the RICO claims in the present suit are essentially state fraud claims, the Court does not find that factor (e), or for that matter factor (f), which requires the Court to consider the adequacy of the state court proceedings to protect the federal right, weigh heavily against abstention.

Factors (a), (b), (c), and (d) all support abstention. First, through the institution of conservatorship receivership proceedings, the state court has assumed jurisdiction over much of the property in issue. The MDIF as Old Court's receiver is attempting to recover all money due Old Court and ultimately Old Court depositors like the Plaintiffs in this action. Secondly, it would be inconvenient to let this action proceed in federal court given the progress inevitably made at the state level given that MDIF has been serving as Old Court's receiver since November of 1985. Third, and most significantly, to allow this action to proceed would be to allow exactly the sort of piecemeal litigation that *Colorado River* abstention was created to avoid. As previously noted in the discussion of *Burford* abstention, any proceeding in this case would disrupt the comprehensive scheme for resolving the savings and loan crisis imposed by the state legislature and judiciary, and create complications with the ongoing state litigation brought by Old Court's receiver MDIF. Fourth, the state court receivership action against the Old Court directors was brought six months before this action.

It is this Court's position that the *Colorado River* factors point clearly in the direction of abstention primarily due to the considerable weight this Court attaches to the importance of avoiding piecemeal litigation in this instance. The Court reaches this decision even considering the fact that the balance must from the onset by

heavily weighted in favor of the exercise of jurisdiction. Quoting again from *Cone,* of 17.

Abstention will not be granted under the doctrine established in *Younger v. Harris.* While *Younger* abstention has been applied with respect to non criminal state proceedings, see *Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423 (1982), the Court is not aware of any instance where *Younger* abstention has been applied when the Plaintiff is not seeking to directly block a state proceeding. If *Younger* abstention were allowed in this situation, the Court would essentially be equating *Younger* abstention with *Colorado River* abstention, but without the carefully considered factors articulated by the Supreme Court in *Colorado River* and *Cone* that limit the application of *Colorado River* abstention.

Accordingly, abstention is proper under both *Burford* and *Colorado River.* And Defendants' motions to dismiss are hereby granted.

Counsel I will enter a formal order in each case in conformity with this opinion. Thank you very much.

THE CLERK: Please rise. This Court is now in recess.

(Court stands in recess)

* * *

I, EILEEN KANE, do certify that the foregoing is a correct transcript of the proceedings in the matter of Tafflin, et al. versus Levitt, et al.

1/25/88 Eileen Kane

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRANCINE TAFFLIN, SEYMOUR ZUCKERKMAN, ERIS ZUCKERMAN, RENALEE SELVIN, JOAN ZUCKERMAN, SYLVIA ZUCKERMAN, SEYMOUR ZUCKERMAN, etc., GEORGE R. LYON, GEORGE C. LYON, PETER M. LYON, BRUCE K. LYON, ELIZABETH A. LYON, GEORGE R. LYON and MARY G. LATHROP, etc., KENT H. BUTCHER, STANLEY Z. FELSENBERG, etc., MARGARET GRAVES, THURMAN L. GRAVES, SANDRA L. PLETKA

v.

JEFFREY A. LEVITT, LCP CORPORATION, ALLAN H. PEARLSTEIN, JEROME S. CARDIN, LIGHT STREET PARTNERSHIP, ALLEN FEINBERG, DAVID UHLFELDER, ROBERT D. PEARLSTEIN, SAMUEL SHOUBIN, DENNIS E. GUIDICE, KAROL LEVITT, ROSEMARY PEARLSTEIN, OLD COURT SAVINGS & LOAN, INC., MARYLAND SAVINGS SHARE INSURANCE CORP., MARYLAND DEPOSIT INSURANCE FUND CORPORATION, CHARLES C. HOGG, II, PAUL B. TRICE, JR., GEORGE W. H. PIERSON, JEROME F. DOLIVKA, FRANCIS F. ANDERSON, MICHAEL J. DIETZ, LEONARD BASS, JOHN C. DONOHUE, SR., HENRY R. ELSNIC, JOHN D. FAULKNER, JR., JAMES D. LAUDEMAN, TERRY L. NEIFELD, GLASS AND ASSOCIATES, P.A., CARDIN AND CARDIN, P.A.

CIVIL NO. B-87-668

FILED ENTERED
LODGED RECEIVED

DEC 9 1987

AT BALTIMORE
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY DEPUTY

ORDER

In accordance with the Court's oral opinion rendered at the conclusion of the hearing held on December 4, 1987, IT IS, this 8th day of December, 1987, by the United States District Court for the District of Maryland,

ORDERED:

(1) That the motions filed by the defendants in support of dismissal on the grounds of abstention BE, and the same hereby ARE, GRANTED;

(2) That the Complaint BE, and the same hereby IS, DISMISSED WITHOUT PREJUDICE; and

(3) That the Clerk shall mail a copy forthwith to counsel of record.

Walter E. Black, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

*

FRANCINE TAFFLIN, SEYMOUR ZUCKERMAN, ERIS ZUCKERMAN, RENALEE SELVIN, JOAN ZUCKERMAN, SYLVIA ZUCKERMAN, SEYMOUR ZUCKERMAN, etc., GEORGE R. LYON, GEORGE C. LYON, PETER M. LYON, BRUCE K. LYON, ELIZABETH A. LYON, GEORGE R. LYON and MARY G. LATHROP, etc.,

*

v.

JEFFREY A. LEVITT, LCP CORPORATION, ALLAN H. PEARLSTEIN, JEROME S. CARDIN, LIGHT STREET PARTNERSHIP, ALLEN FEINBERG, DAVID UHLFELDER, ROBERT D. PEARLSTEIN, SAMUEL SHOUBIN, DENNIS E. GUIDICE, KAROL LEVITT, ROSEMARY PEARLSTEIN, OLD COURT SAVINGS & LOAN, INC., MARYLAND SAVINGS SHARE INSURANCE CORP., MARYLAND DEPOSIT INSURANCE FUND CORPORATION, CHARLES C. HOGG, II, PAUL B. TRICE, JR., GEORGE W. H. PIERSON, JEROME F. DOLIVKA, FRANCIS F. ANDERSON, MICHAEL J. DIETZ, LEONARD BASS, JOHN C. DONOHUE, SR., HENRY R. ELSNIC, JOHN D. FAULKNER, JR., JAMES D. LAUDEMAN, TERRY L. NEIFELD, GLASS AND ASSOCIATES, P.A., CARDIN AND CARDIN, P.A.

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CIVIL NO. B-87-684

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FILED ENTERED
LODGED RECEIVED

DEC 9 1987

AT BALTIMORE
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY DEPUTY

ORDER

In accordance with the Court's oral opinion rendered at the conclusion of the hearing held on December 4, 1987, IT IS, this 8th day of December, 1987, by the United States District Court for the District of Maryland,

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(3) That the Clerk shall mail a copy forthwith to counsel of record.

Walter E. Black, Jr.
United States District Judge

FILE COPY

JUDGMENT

UNITED STATES
COURT OF APPEALS
for the Fourth Circuit

No. 88-3019

FRANCINE TAFFLIN; SEYMOUR ZUCKERMAN; ERIS ZUCKERMAN; RENALEE SELVIN; JOAN ZUCKERMAN; SYLVIA ZUCKERMAN; SEYMOUR ZUCKERMAN, Executor of the Estate of Samuel Zuckerman; GEORGE R. LYON; GEORGE C. LYON; PETER M. LYON; BRUCE K. LYON; ELIZABETH A. LYON; GEORGE R. LYON; MARY G. LATHROP, Personal Representatives of the Estate of GEORGE M. LYON; KENT H. BUTCHER; STANLEY Z. FELSENBERG, M.D., Personal Representtive of the Estate of Minnie Felsenberg; MARGARET GRAVES; THURMAN L. GRAVES; SANDRA L. PLETKA; GERTRUDE DURSO; ENTERPRISE EQUIPMENT CO., INC.; CARMEN R. GOLDINGS; CLELIA S. GOLDINGS; ETHAN D. GOLDINGS; HERBERT J. GOLDINGS, MD; SARAH M. GOLDINGS; DORIS KONIG; WINDELL R. CARTER; CATHERINE CARTER; MITCHELL W. LANDY; RIO GRANDE SAVINGS & LOAN ASSOC

Plaintiffs-Appellants

v.

JEFFREY A. LEVITT; LCP CORPORATION; ALLAN H. PEARLSTEIN; JEROME S. CARDIN; LIGHT STREET PARTNERSHIP; ALLEN FEINBERG; ROBERT D. PEARLSTEIN; SAMUEL SHOUBIN; DENNIS E. GUIDICE; KAROL LEVITT; ROSEMARY PEARLSTEIN; OLD COURT SAVINGS & LOAN, INC; MARYLAND SAVINGS SHARE INSURANCE CORP.; MARYLAND DEPOSIT INSURANCE FUND CORPORATION; CHARLES C. HOGG, II; PAUL B. TRICE, JR.; GEORGE W. PIERSON, H.; JEROME F. DOLIVKA; FRANCIS F. ANDERSON; MICHAEL J. DIETZ;

LEONARD BASS; JOHN C. DONOHUE, SR.; HENRY R. ELSNIC; JOHN D. FAULKNER, JR.; JAMES D. LAUDEMAN; TERRY L. NEIFELD; GLASS AND ASSOCIATES, P.A.; CARDIN AND CARDIN, P.A.

Defendants-Appellees

No. 88-3020

FRANCINE TAFFLIN; SEYMOUR ZUCKERMAN; ERIS ZUCKERMAN; RENALEE SELVIN; JOAN ZUCKERMAN; SYLVIA ZUCKERMAN; SEYMOUR ZUCKERMAN, Executor of the Estate of Samuel Zuckerman; GEORGE R. LYON; GEORGE C. LYON; PETER M. LYON; BRUCE K. LYON; ELIZABETH A. LYON; GEORGE R. LYON; MARY G. LATHROP, Personal Representatives of the Estate of George M. Lyon; GERTRUDE DURSO; ENTERPRISE EQUIPMENT CO., INC.; CARMEN R. GOLDINGS; CLELIA S. GOLDINGS; ETHAN D. GOLDINGS; HERBERT J. GOLDINGS, MD; SARAH M. GOLDINGS; DORIS KONIG; WINDELL R. CARTER; CATHERINE CARTER; MITCHELL W. LANDY; RIO GRANDE SAVINGS & LOAN ASSOC

Plaintiffs-Appellants

v.

JEFFREY A. LEVITT; LCP CORPORATION; ALLAN H. PEARLSTEIN; JEROME S. CARDIN; LIGHT STREET PARTNERSHIP; ALLEN FEINBERG; ROBERT D. PEARLSTEIN; SAMUEL SHOUBIN; DENNIS E. GUIDICE; KAROL LEVITT; ROSEMARY PEARLSTEIN; OLD COURT SAVINGS & LOAN, INC; MARYLAND SAVINGS SHARE INSURANCE CORP.; MARYLAND DEPOSIT INSURANCE FUND CORPORATION; CHARLES C. HOGG, II; PAUL B. TRICE, JR.; GEORGE W. PIERSON, H.; JEROME F. DOLIVKA; FRANCIS F. ANDERSON; MICHAEL J. DIETZ; LEONARD BASS; JOHN C. DONOHUE, SR.; HENRY R. ELSNIC; JOHN D. FAULKNER, JR.; DAVID UHLFELDER; JAMES D. LAUDEMAN; TERRY L. NEIFELD; GLASS AND ASSOCIATES, P.A.; CARDIN AND CARDIN, P.A.

Defendants-Appellees

APPEALS FROM the United States District Court for the District of Maryland, at Baltimore.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland at Baltimore and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby,

Affirmed.

John M. Greacen
CLERK

TEXT OF FEDERAL STATUTES INVOLVED

Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. §78c(a)(10), provides:

> (a) When used in this chapter, unless the context otherwise requries—
>
> (10) the term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1964(c), provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter

may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

No. 88-1650

Supreme Court, U.S.
FILED
MAY 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FRANCINE TAFFLIN, *et al.*,
Petitioners,

v.

JEFFREY A. LEVITT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

RALPH S. TYLER, III
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL FOR THE STATE OF MARYLAND
Seven North Calvert Street
Baltimore, Maryland 21202
(301) 576-6300
Counsel for State of Maryland Deposit Insurance Fund Corporation

DAVID B. ISBELL
WILLIAM H. ALLEN
CHARLES F.C. RUFF
MARK H. LYNCH
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202) 662-6000
Counsel for Venable, Baetjer & Howard

ANDREW H. MARKS
Counsel of Record
CLIFTON S. ELGARTEN
LUTHER ZEIGLER
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500
Counsel for Former Directors and Officers of Maryland Savings-Share Insurance Corporation

(Additional Counsel Listed on Back of Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

JAMES P. ULWICK
KRAMON & GRAHAM
Sun Life Building
Charles Center
20 South Charles Street
Baltimore, Maryland 21201
(301) 752-6030

PAUL D. KRAUSE
CAROL ANN PETREN
JAYSON L. SPIEGEL
JORDON COYNE SAVITS & LOPATA
Suite 500
1030 15th Street, N.W.
Washington, D.C. 20005
(202) 371-1800

AUBREY M. DANIEL, III
WILLIAMS & CONNOLLY
Hill Building
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

ROBERT W. HESSELBACHER, JR.
LAXALT WASHINGTON PERITO
& DUBUC
10th Floor
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-4000

JOHN H. ZINK, III
COOK HOWARD DOWNES & TRACY
210 Allegheny Avenue
Towson, Maryland 21204
(301) 494-9154

NANCY A. MARKOWITZ
ANDERSON BAKER KILL & OLICK
Suite 700
1800 K Street, N.W.
Washington, D.C. 20006
(202) 466-7921

HOWARD B. POSSICK
ARENT FOX KINTNER PLOTKIN
& KAHN
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-6176

JAY I. MORSTEIN
FRANK BERNSTEIN CONAWAY
& GOLDMAN
300 East Lombard Street
Baltimore, Maryland 21202
(301) 625-3500

JAMES A. ROTHSCHILD
ANDERSON, COE & KING
Central Savings Bank Building
Suite 2000
201 North Charles Street
Baltimore, Maryland 21201
(301) 752-1630

DANIEL F. GOLDSTEIN
BROWN & GOLDSTEIN
Maryland Bar Center
Suite 300
520 W. Fayette Street
Baltimore, Maryland 21201
(301) 962-1030

ANDREW RADDING
BLADES & ROSENFELD, P.A.
1200 Sun Life Building
20 South Charles Street
Baltimore, Maryland 21201
(301) 539-7558

FRANCIS S. BROCATO
BROCATO & KEELTY
1402 Fidelity Building
210 North Charles Street
Baltimore, Maryland 21201
(301) 576-7300

STEPHEN C. WINTER
WINTER & ASSOCIATES
606 Bosley Avenue
Towson, Maryland 21204
(301) 321-6222

RONALD W. FUCHS
ECCLESTON & SEIDLER
Suite 100
110 East Lexington Street
Baltimore, Maryland 21202
(301) 752-7474

HAROLD H. BURNS
Suite 200
300 Cathedral Street
Baltimore, Maryland 21201
(301) 528-0044

THOMAS G. BODIE
POWER & MOSNER
21 W. Susquehanna Avenue
Towson, Maryland 21204
(301) 823-1250

Additional Counsel for Respondents

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1650

FRANCINE TAFFLIN, *et al.*,
Petitioners,
v.
JEFFREY A. LEVITT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

This case arises out of the 1985 crisis in Maryland's savings and loan industry. Petitioners hold certificates of deposit in one of the failed institutions, Old Court Savings & Loan, Inc.*

The crisis arose from the rumored instability of Old Court and another state-chartered savings and loan institution.[1] The rumors triggered a general run on insti-

* Pursuant to Supreme Court Rule 28.1, Respondents state that Old Court Savings & Loan, Inc., which is currently in receivership, has no publicly traded parent, subsidiary or affiliate corporations.

[1] This account of the background to this case is taken from the opinion in *Brandenburg v. Seidel*, 859 F.2d 1179, 1181-82 (4th Cir. 1988), which the court below incorporated in its opinion. (Pet. App. A-4.)

tutions insured by the Maryland Savings-Share Insurance Corporation (MSSIC), a quasi-public institution. The panic became so severe that MSSIC itself was endangered and the state's savings and loan industry was threatened with collapse. The Governor declared a state of public crisis, limited withdrawals from MSSIC-insured institutions and called the General Assembly into special session.

The General Assembly enacted legislation to create a state-operated deposit insurance institution, the Maryland Deposit Insurance Fund (MDIF), to replace MSSIC. The legislation also established a framework for the administration of conservatorships and receiverships for insolvent savings and loans and gave MDIF the right to be named conservator or receiver of any failed institution insured by it. Finally, the legislation gave to the state court administering a MDIF conservatorship or receivership exclusive jurisdiction of all claims related to the liability of the insolvent institution or of MDIF. To implement this legislative scheme, Maryland's highest court appointed a single judge to adjudicate all claims arising out of the conservatorship and receivership proceedings for the failed savings and loan associations.

Pursuant to the legislation, the state court placed Old Court in receivership and named MDIF receiver. MDIF, as receiver, has brought state court actions against each of the respondents to recover sums that ultimately will be distributed through MDIF to reimburse Old Court depositors, including petitioners. *See Brandenburg*, 859 F.2d at 1192. The State of Maryland, through MDIF, has assured all depositors and certificate holders that it will repay the entire principal amount of their accounts. MDIF has announced, however, that Old Court depositors and certificate holders will not be compensated for interest accruing after November 8, 1985, and that interest for a prior period will be paid only at reduced rates. (Pet. App. A-5.)

Notwithstanding Maryland's efforts to have all claims for relief arising out of the savings and loan crisis adjudicated systematically in its courts, petitioners filed these actions in federal court complaining of MDIF's announced curtailment of interest on their Old Court deposits. They invoked two federal statutes, the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act, and presented a number of pendent state law claims as well. Petitioners premised their claim under the '34 Act on the assertion that their certificates of deposit are "securities" within the meaning of the Act. Petitioners named as defendants the former officers and directors of Old Court, the former officers and directors of MSSIC, the law firm of Venable, Baetjer & Howard (counsel to MSSIC and Old Court), Old Court's accounting firm, and MDIF itself. (Pet. App. A-4.)[2]

The district court granted respondents' motions to dismiss the complaint. Applying this Court's determination in *Marine Bank v. Weaver*, 455 U.S. 551 (1982), that the Exchange Act does not apply to certificates of deposit in a federally regulated and insured bank, the district court held that Maryland's comprehensive regulatory and insurance system governing state-chartered savings and loans barred plaintiffs from characterizing their certificates as "securities" subject to that Act. (Pet. App. A-24.)

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[2] At an early stage of the action, MDIF was dismissed as a defendant by the district court on Eleventh Amendment grounds, and petitioners did not appeal this order. (Pet. App. A-4.) Nonetheless, because of MDIF's and the State of Maryland's substantial interest in preventing the disruption to the State's remedial efforts that this federal action would cause, and because petitioners have persisted with their claims against MSSIC, MDIF's predecessor, and Old Court, of which MDIF is receiver, the Attorney General, as counsel for MDIF, joined in the brief filed in the court of appeals in support of the district court's order dismissing the claims against respondents. The Attorney General has also joined in this brief in opposition.

The district court further held that it should abstain from deciding petitioners' RICO claims in deference to the state court proceedings. The district court noted that state courts presumptively have concurrent jurisdiction over federal claims (Pet. App. A-25), and that "the RICO claims in the present suit are essentially state fraud claims," which the state courts are fully qualified to handle (*id.* at A-28). In holding that abstention was necessary and appropriate under both *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the district court observed that a substantial number of the defendants in the federal action were defendants in MDIF's pending state court actions, as receiver of Old Court, against the Old Court directors and the former MSSIC directors. Thus, the court reasoned that, if petitioners were allowed to proceed in the federal court, they would have "circumvented the receivership process." (Pet. App. A-27.) Further, any money awarded to petitioners "would potentially reduce the available funds" for satisfying a judgment in favor of depositors generally in the receivership actions. (*Id.*)

The court of appeals affirmed. The court agreed with the district court that *Marine Bank* foreclosed petitioners' Exchange Act claim because "there was a comprehensive regulatory and insurance system applicable to Old Court so that its certificates of deposit did not fall within the statutory definition." (Pet. App. A-7.) The court rejected petitioners' argument that, because, in hindsight, Maryland's regulatory system had failed, certificates of deposit in Maryland savings and loans should be treated differently from certificates of deposit in federally regulated institutions. The court noted that "[t]he nature of an instrument is to be determined at the time of issuance, not at some subsequent time." (Pet. App. A-8, *quoting West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir.), *cert. denied*, 482 U.S. 906 (1987).) If the rule were otherwise, the court said, it

could lead to CD's not being a security when the deposit was made but turning into a security the next year because of a change in the state's regulatory or insurance program. (Pet. App. A-9.) The court concluded that "application of *Marine Bank* depends upon the comprehensiveness of the scheme of regulation, and by that test we think that the Maryland system qualified to render the certificates of deposit not 'securities.'" (*Id.* A-8.)

The court of appeals also agreed with the district court that petitioners could pursue their RICO claim in the state court so that, with the Securities Exchange Act claim out of the case, petitioners should be remitted to the comprehensive state court proceeding. The court had just decided *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988), which also grew out of the Maryland savings and loan crisis, and had there decided both that state courts could entertain RICO claims and that Maryland's "comprehensive scheme for the rehabilitation and liquidation of insolvent state-chartered savings and loan associations . . . provided a proper basis for the district court to abstain" in deference to the state court proceedings. (Pet. App. A-10.)

REASONS FOR DENYING THE WRIT

Neither of the questions presented by the petition is worthy of review by the Court. Both questions were decided correctly by the court of appeals applying standards established by decisions of this Court. On the question whether certificates of deposit are securities within the meaning of the 1934 Securities Exchange Act, this Court's decision in *Marine Bank v. Weaver*, 455 U.S. 551 (1982), controls, and there is complete unanimity among the circuits as to what that decision means. On the question whether state courts have concurrent jurisdiction over RICO claims, the decision below is in line with the overwhelming weight of authority applying to RICO jurisdiction the rigorous test for exclusive federal jurisdiction

laid down in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), and the one aberrant decision cited by petitioners does not present a sufficient conflict to warrant this Court's review. Indeed, the obvious need in this case to resolve all claims, state *and* federal, in a single forum, in order better to allocate assets and obtain recompense for all depositors, reinforces the conclusion that one should not lightly presume that Congress intended to divest state courts of authority over federal statutory claims.

I. WHETHER CERTIFICATES OF DEPOSIT IN MARYLAND SAVINGS AND LOANS ARE SECURITIES IS NOT A QUESTION WORTHY OF REVIEW.

In *Marine Bank v. Weaver*, this Court held that the definition of "security" in the Securities Exchange Act of 1934 does not extend to certificates of deposit in federally chartered banks. 455 U.S. at 558-59. The Court reasoned that the comprehensive scheme of regulation governing the issuing institutions ensured that those who make deposits evidenced by such certificates are not subject to the same type and level of risk as are purchasers of "securities" entitled to the protection of the Securities Exchange Act.

At issue in this case likewise are certificates of deposit. The court of appeals held that the fact that the certificates of deposit here were in institutions pervasively regulated by a state, rather than by a federal agency, did not change their basic character. The existence of "a comprehensive regulatory and insurance system applicable to Old Court" was determinative. (Pet. App. A-7.) The court pointed out that Maryland law vested supervisory authority over state-chartered savings and loan associations in two agencies and that deposits in the MSSIC member associations, of which Old Court was one, were insured by MSSIC. (*Id.*) These agencies administered statutes requiring associations to maintain reserve accounts, to comply with periodic reporting, inspection and audit requirements, and to conduct their promotional activities in accordance with

regulations promulgated by a state agency. (*Id.*) In holding that the existence of a comprehensive regulatory scheme is determinative under *Marine Bank*, and not whether that scheme is state, federal or even foreign, the court below followed consistent precedent in the lower courts applying *Marine Bank*. *See, e.g., Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458, 1462 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1125 n.33 (5th Cir. 1985). *See also West v. Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir.), *cert. denied*, 482 U.S. 906 (1987).

Petitioners argue that the courts below should have engaged in an extended empirical analysis of the efficacy of the Maryland regulatory and insurance system as that system was actually administered. They say that a system that has ultimately proven unable to provide them with timely repayment of both principal and interest cannot, in retrospect, be said to be one that "virtually guarantees" the safety of their funds. (Pet. 10-13.) The court of appeals properly refused to engage in such *post hoc* review of the way Maryland administered its regulatory system. The court correctly concluded that the rule of *Marine Bank* does not depend on the existence of a perfect regulatory regime or require the federal courts to undertake an empirical evaluation of the administration of the regulatory program in order to ascertain whether a certificate of deposit is a security at any given moment.[3]

[3] In conducting such review, the federal courts would not always have the benefit of hindsight since, if a certificate of deposit was a security, it could form the basis of an Exchange Act claim in contexts wholly apart from the failure of the issuing institution. Under petitioners' theory, in order to decide the collateral issue whether a certificate of deposit was a security, district courts would routinely take evidence to evaluate the way in which a given state was administering its regulatory system. This intrusive oversight of state regulatory regimes not only offends principles of federalism but also could have disastrous practical consequences.

Here, the fact that the State of Maryland has acted to help ensure recovery of petitioners' deposits reinforces the special character of the certificates at issue. Although petitioners will not ultimately be able to recover all interest to which they believe themselves due and have been subject to delays in the return of their deposits, the State has acted expeditiously to reduce their losses and provided them with substantial protection that is far superior to the protection available to purchasers of "securities," as that term is used in the Exchange Act. Moreover, there is no reason to believe that, in enacting the Securities Exchange Act, Congress meant to give some depositors—holders of certificates of deposit—an advantage in available remedies over others—the holders of demand deposit accounts in the same institutions.

Petitioners make a veiled suggestion that the decision below creates a conflict in the circuits. There is no substance to this suggestion. The federal appellate decisions following *Marine Bank* have uniformly held that "the nature of an instrument is to be determined at the time of issuance, not at some subsequent time." *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir), *cert. denied*, 482 U.S. 906 (1987), *quoting Great Western Bank & Trust v. Kotz*, 532 F.2d 1252, 1255 (9th Cir. 1976). Moreover, no court that has applied the *Marine Bank* analysis to certificates of deposit has undertaken the sort of after-the-fact assessment of the adequacy of a regulatory scheme that petitioners urge here.[4] Petitioners' reliance on *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230 (2d Cir. 1985), is misplaced. That case did not involve certificates of deposit in a bank but rather so-called certificates of deposit sold by Merrill Lynch in a secondary market, created by Merrill Lynch, that was unregulated and uninsured by any state or federal banking laws. Under those circumstances—which are quite distinct from the instant case—the court held that the Merrill Lynch investment product was a security. *Id.* at 241-42.

A federal court determination that a state regulatory system was inadequate could create precisely the kind of run on the institutions that gave rise to this case.

[4] In *West* the plaintiffs challenged the effectiveness of Mexico's regulatory program. After noting that the nature of an instrument is to be determined at the time of its issuance, 807 F.2d at 826, the Ninth Circuit pretermitted detailed consideration of plaintiffs' contention that *post hoc* analysis is appropriate by holding that any inquiry into the effectiveness of a foreign government's actions is barred by the act of state doctrine. 807 F.2d at 828.

In short, the court of appeals correctly applied *Marine Bank* in deciding that the Old Court certificates of deposit were not securities within the scope of the federal securities laws, and its decision is consistent with those of its sister circuits.[5]

II. WHETHER STATE COURTS ARE DIVESTED OF JURISDICTION OVER RICO CLAIMS IS NOT A QUESTION WORTHY OF REVIEW.

The court below held that, in light of Maryland's comprehensive approach to the payment of depositors, this was an appropriate case for federal court abstention in deference to the coordinated state court proceedings. Petitioners do not question that obviously sound judgment. What they say is that such coordinated proceedings are impermissible here because the state courts are not competent to hear RICO claims. However, the court of ap-

[5] The precise question posed by the petition is unlikely to recur since few, if any, states still have in place state or private insurance programs as an alternative to federal deposit insurance. *See, e.g., Report of the Special Counsel on the Savings and Loan Crisis in the State of Maryland* 94-95 (Jan. 8, 1986) (identifying Massachusetts, North Carolina, Ohio and Pennsylvania as the only other states that have "passed legislation enabling the formation of state or private associations which would be an alternative and sometimes a supplement to FSLIC"). Since 1986, North Carolina and Ohio have effectively repealed their respective statutes permitting alternatives to federal insurance. *See* N.C. Gen. Stat. § 54B-17 (1987); Ohio Rev. Code Ann. § 1151.41 (1988).

peals' conclusion that state courts have jurisdiction to hear RICO claims is plainly correct and in accord with the clear weight of emerging federal and state authority.

Recognition of state court competence to hear RICO claims reflects the long-settled principle that "state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981) (citations omitted). In *Gulf*, this Court began with the "presumption that state courts enjoy concurrent jurisdiction." *Id.* at 478 (citations omitted). This presumption can be rebutted only by (1) "an explicit statutory directive", (2) "unmistakable implication from legislative history", or (3) "a clear incompatibility between state-court jurisdiction and federal interests." *Id.* None of these three factors is present here.

First, as petitioners concede, there is no "explicit statutory directive" in RICO that jurisdiction is vested exclusively in the federal courts. The statute provides only that an injured person "may sue" in a district court. 18 U.S.C. § 1964(c). This Court has held that a statute that uses the word "may" in conferring jurisdiction of a federal claim on a federal court "does not state or even suggest that such jurisdiction shall be exclusive." *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 506 (1961). *See Gulf Offshore*, 453 U.S. at 479 ("It is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action"). In fact, inferring exclusive federal jurisdiction over RICO claims would be inconsistent with Congress' specific statutory mandate that the Act is to "be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970). *See Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 498 (1985). These purposes are

best served by increasing rather than decreasing the forums in which RICO claims may be pursued.[6]

Second, there is literally nothing in the legislative history, let alone an "unmistakable implication," to indicate that Congress intended to make jurisdiction over RICO exclusively federal. All of the courts that have addressed this issue have noted that the "legislative history contains no indication that Congress ever expressly considered the question of concurrent jurisdiction." *Brandenburg*, 859 F.2d at 1193. As RICO's principal draftsman has remarked, "no one even thought of the issue." *Id.* (citations omitted).[7] It is, of course, precisely where a statute and its legislative history are silent that the historical presumption of state court competence must be determinative.[8]

Third, there is no "clear incompatibility" between a RICO claim and state court jurisdiction. On the con-

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[6] Indeed, it is curious that petitioners, as parties claiming the benefits of RICO's remedial aims, seek to constrict the number of forums in which RICO claims can be brought. This short-sighted tactic—which will not serve the interests of RICO plaintiffs generally—is, of course, necessary for petitioners to overcome their principal hurdle, which is the court of appeals' wise decision to abstain from adjudicating the RICO claims in deference to Maryland's extensive and intricate efforts to resolve the State's savings and loan crisis in the State's own courts. This peculiar circumstance under which petitioners object to concurrent jurisdiction over RICO claims is one more reason why this case is not appropriate for this Court's review.

[7] *See also Chivas Products Ltd. v. Owen*, 864 F.2d 1280, 1283 (6th Cir. 1988); *Lou v. Belzberg*, 834 F.2d 730, 736 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988); *Cianci v. Superior Court*, 40 Cal. 3d 903, 710 P.2d 375, 379, 221 Cal. Rptr. 575 (1985).

[8] For this reason, petitioners' reliance on *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143 (1987) is misplaced. In *Malley-Duff*, this Court held that the Clayton Act's statute of limitations may be "borrowed" for RICO. That issue, involving the need to supply a limitations period, requires the Court actively to develop analogies from other statutes. That inquiry has little in common with the search for a congressional intention to oust state courts of their presumptive jurisdiction over federal claims.

trary, state courts are well-qualified to hear RICO claims, particularly since RICO includes a host of state law crimes among its predicate offenses. 18 U.S.C. § 1961 (1)(A). To the extent that RICO claims are based on violations of federal criminal law, the vast majority of cases rest on allegations of mail and wire fraud, which "involve garden variety state law fraud" with which state courts are fully familiar. *Belzberg*, 834 F.2d at 738. *See also Brandenburg*, 859 F.2d at 1195. Where a cause of action has both state and federal elements, it is no less appropriate under our federal system for a state court to determine the issues of federal law than it is for a federal court to address issues of state law.

Indeed, the special circumstances of this case highlight the importance of concurrent state court jurisdiction over federal claims. In *Brandenburg*, the Fourth Circuit explained in detail how permitting a few depositors, such as the petitioners, to maintain a federal action would interfere with Maryland's recovery scheme for the benefit of all depositors. 859 F.2d at 1191-92. First, petitioners are attempting to recover for themselves assets that the receiver is attempting to marshal for depositors generally. *Id.* Second, in attempting to recover interest that the receivership court has excused Old Court from paying, petitioners would have the federal district court undermine the orders of the state court attempting to achieve a just result for *all* depositors. *Id.*

Precisely because situations arise within our federal system in which the state courts are better equipped than the federal courts to address and resolve the entirety of some controversy, it should not lightly be presumed that Congress intended to hamstring those courts by stripping them of the power to hear federal claims—claims that are easily made (though not so easily proved) and once made (even if unprovable) would disable the state courts from resolving the entire controversy. There is no basis for thinking that Congress meant to give RICO allegations such an effect.

At the time the decision below was rendered, the federal appellate courts and the highest state courts that had considered the issue were unanimous in the view that state courts are competent to hear private RICO claims.[9] Petitioners nevertheless point to what they believe will develop into a significant conflict emanating from a subsequent decision of a divided Sixth Circuit panel in *Chivas Products Ltd. v. Owen*, 864 F.2d 1280. The Sixth Circuit reasoned that, because the language of the section of RICO creating a civil remedy is nearly identical to the section of the Clayton Act creating the private antitrust remedy, and because jurisdiction under the antitrust laws lies exclusively in the federal courts, RICO jurisdiction is also exclusively federal.

However similar RICO's language may be to that of the Clayton Act, such general modeling of one statute after another does not rise to the level of an "unmistakable implication" of an actual congressional intention to divest state courts of jurisdiction. Congress had no such actual intention precisely because, as the Sixth Circuit panel conceded, no one in Congress actually thought about the issue. *Chivas Products*, 864 F.2d at 1283. The kind of fictive intent attributed to Congress by the Sixth Circuit is just what this Court meant to foreclose by its emphasis in *Gulf Offshore* that either explicit statutory direction or an unmistakable implication from the legislative history is required to rebut the presumption of concurrent state jurisdiction.

In short, whatever potential for conflict *Chivas* may have created is likely to prove short-lived. That decision stands alone against the weight of authority, and it is at war with the logic and good sense of concurrent state court jurisdiction. There is good reason to expect that

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[9] *See Brandenburg v. Seidel*, 859 F.2d 1179; *Lou v. Belzberg*, 834 F.2d 730; *Cianci v. Superior Court*, 710 P.2d 375; *Simpson Elec. Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450, 530 N.E.2d 860, 534 N.Y.S.2d 152 (1988); *Rice v. Janovich*, 109 Wash. 2d 48, 742 P.2d 1230 (1987). *See also County of Cook v. MidCon Corp.*, 773 F.2d 892, 905 n.4 (7th Cir. 1985).

the Sixth Circuit will bow to the force of the mainstream view as the weight of authority to the contrary builds against it. A grant of certiorari at this time, in this case, would bring the issue to the Court prematurely.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

RALPH S. TYLER, III
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL FOR THE STATE OF MARYLAND
Seven North Calvert Street
Baltimore, Maryland 21202
(301) 576-6300
Counsel for State of Maryland Deposit Insurance Fund Corporation

DAVID B. ISBELL
WILLIAM H. ALLEN
CHARLES F.C. RUFF
MARK H. LYNCH
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202) 662-6000
Counsel for Venable, Baetjer & Howard

ANDREW H. MARKS
Counsel of Record
CLIFTON S. ELGARTEN
LUTHER ZEIGLER
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500
Counsel for Former Directors and Officers of Maryland Savings-Share Insurance Corporation

Additional Counsel for Respondents

JAMES P. ULWICK
KRAMON & GRAHAM
Sun Life Building
Charles Center
20 South Charles Street
Baltimore, Maryland 21201
(301) 752-6030

JAMES A. ROTHSCHILD
ANDERSON, COE & KING
Central Savings Bank Building
Suite 2000
201 North Charles Street
Baltimore, Maryland 21201
(301) 752-1630

PAUL D. KRAUSE
CAROL ANN PETREN
JAYSON L. SPIEGEL
JORDON COYNE SAVITS & LOPATA
Suite 500
1030 15th Street, N.W.
Washington, D.C. 20005
(202) 371-1800

AUBREY M. DANIEL, III
WILLIAMS & CONNOLLY
Hill Building
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

ROBERT W. HESSELBACHER, JR.
LAXALT WASHINGTON PERITO & DUBUC
10th Floor
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-4000

JOHN H. ZINK, III
COOK HOWARD DOWNES & TRACY
210 Allegheny Avenue
Towson, Maryland 21204
(301) 494-9154

NANCY A. MARKOWITZ
ANDERSON BAKER KILL & OLICK
Suite 700
1800 K Street, N.W.
Washington, D.C. 20006
(202) 466-7921

HOWARD B. POSSICK
ARENT FOX KINTNER PLOTKIN & KAHN
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-6176

JAY I. MORSTEIN
FRANK BERNSTEIN CONAWAY & GOLDMAN
300 East Lombard Street
Baltimore, Maryland 21202
(301) 625-3500

DANIEL F. GOLDSTEIN
BROWN & GOLDSTEIN
Maryland Bar Center
Suite 300
520 W. Fayette Street
Baltimore, Maryland 21201
(301) 962-1030

ANDREW RADDING
BLADES & ROSENFELD, P.A.
1200 Sun Life Building
20 South Charles Street
Baltimore, Maryland 21201
(301) 539-7558

FRANCIS S. BROCATO
BROCATO & KEELTY
1402 Fidelity Building
210 North Charles Street
Baltimore, Maryland 21201
(301) 576-7300

STEPHEN C. WINTER
WINTER & ASSOCIATES
606 Bosley Avenue
Towson, Maryland 21204
(301) 321-6222

RONALD W. FUCHS
ECCLESTON & SEIDLER
Suite 100
110 East Lexington Street
Baltimore, Maryland 21202
(301) 752-7474

HAROLD H. BURNS
Suite 200
300 Cathedral Street
Baltimore, Maryland 21201
(301) 528-0044

THOMAS G. BODIE
POWER & MOSNER
21 W. Susquehanna Avenue
Towson, Maryland 21204
(301) 823-1250

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

M. Norman Goldberger
Brian P. Flaherty
*Gary L. Leshko
WOLF, BLOCK, SCHORR
AND SOLIS-COHEN
Twelfth Floor,
Packard Building
15th and Chestnut Streets
Philadelphia, PA 19102-2678
(215) 977-2000

Counsel for Petitioners

*Andrew H. Marks
Clifton S. Elgarten
Luther Zeigler
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500

Counsel for Respondents, Former Directors and Officers of Maryland Savings-Share Insurance Corporation

**Counsel of Record*

PETITION FOR CERTIORARI FILED APRIL 8, 1989
CERTIORARI GRANTED MAY 30, 1989

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RELEVANT DOCKET ENTRIES

Francine Tafflin, et al. v. Jeffrey Levitt, et al.
Docket No. B-87-668

Date	Proceedings
January 7, 1986	Complaint Filed.
February 5, 1986	Glass & Assoc., P.A.'s Motion For Consolidation, Certificate of Service, Filed.
February 5, 1986	Glass & Assoc. P.A.'s Motion to Dismiss Or, In The Alternative, Motion To Stay, Certificate of Service, Filed.
February 7, 1986	Maryland Deposit Ins. Fund's Motion To Dismiss Or Transfer, Memo., Certificate of Service, Filed.
February 24, 1986	Motion Of Jeffrey A. Levitt, Esq. Et Al. To Dismiss Or To Transfer, Memo., Certif. Filed.
February 24, 1986	Motion Of Jeffrey A. Levitt, Esq. Et Al. To Stay, Memo., Certificate, Filed.
February 24, 1986	Motion Of Jeffrey A. Levitt, Et Al. To Consolidate, Certificate of Service, Filed.
February 28, 1986	Order That This Action Be Consolidated With C.A. 86-0092 For Purposes of Determ. Preliminary Motions, Filed. 3/3/86: Entered and Copies Mailed.
March 3, 1986	Motion Of Jerome S. Cardin, Et Al. To Dismiss, Memo., Certificate, Filed.
March 11, 1986	Amended Complaint, Certificate, Filed.
March 18, 1986	Jerome S. Cardin, Et Al.'s Supplemental Exhibits To Memo. In Support Of Motion To Dismiss, Certificate, Filed.
March 20, 1986	Allen Feinberg's Memo. In Support Of

Date	Proceedings
	Motion To Dismiss, Or In Alternative, To Transfer Or, In Alternative To Stay, Certificate, Filed.
March 28, 1986	Dennis E. Guidice's Motion To Dismiss, Stay, Consolidate Or Transfer, Request For Hearing On Motion, Certificate, Filed.
April 4, 1986	Motion Of David Uhlfelder To Dismiss Amended Complaint, Memo., Certificate Filed.
April 7, 1986	Affidavit Of David Uhlfelder In Support Of Uhlfelder's Motion to Dismiss Amended Complaint, Filed.
April 11, 1986	Order That Requirement That Plffs. File Their Motion For Class Certification Is Stayed For 120 Days. Defts. Shall File Any Preliminary Motions Or Amended Preliminary Motions Triggered By Filing Of Plffs' Amended Complaint By 5/9/86. Plffs. Shall Have Until 6/6/86 To File Any Omnibus Response To Defts' Motions, Etc. Defts' Replys Shall Be Filed By 6/18/86. Plffs Shall Have Until 6/30/86 to File Any Further Briefs. Oral Argument On The Issues Raised In Above Motion Shall Be Held On 8/1/86 At 9:00 A.M., Filed. 4/11/86: Entered And Copies Mailed.
April 16, 1986	Allan H. Pearlstein, Et Al.'s Motion To Dismiss And/Or Transfer In Response To Amended Complaint, Memo., Certificate, Filed.
May 7, 1986	Motion Of Jeffrey A. Levitt, Karol Levitt, & LCP Corp. to Stay Proceedings, Request For Hearing, Certificate, Memo., Certificate, Filed.

Date	Proceedings
May 7, 1986	Motion Of Jeffrey A. Levitt, Karol Levitt, & LCP Corp. To Dismiss Amended Complaint Or, In Alternative, To Transfer, Request For Hearing, Certificate, Memo., Certificate, Filed.
May 8, 1986	Supplemental Memo., In Support Of Maryland Deposit Ins. Fund's Motion To Dismiss, Or In Alternative, To Transfer, Certificate, Filed.
May 8, 1986	Motion Of Hogg To Dismiss Or, In Alternative, To Transfer Proceedings To Dist. Of Maryland, Memo., Certificate, Filed.
May 9, 1986	Motion Of Glass & Associates, P.A. To Dismiss Counts I, II, IV, V & IX Of Amended Complaint, Memo., Certificate, Filed.
May 9, 1986	Motion Of Venable, Baetjer & Howard To Dismiss, Memo., Certificate, Filed.
May 9, 1986	Motion Of Jerome S. Cardin & Cardin & Cardin, P.A. To Dismiss, Memo., Certificate, Filed.
May 9, 1986	Motion By Former MSSIC Directors To Dismiss, Memo., Certificate, Filed.
May 9, 1986	Motion Of Allen Feinbert To Dismiss, Or In Alternative, To Transfer, Or In Alternative To Stay, Affidavit, Memo., Certificate, Filed.
May 12, 1986	Terry Neifeld's Supplemental Memo. Of Points And Authorities In Support Of Motion By Former MSSIC Directors To Dismiss, Certificate, Filed.
May 15, 1986	Motion Of Paul V. Trice, Jr. To Dismiss Or, In Alternative, To Transfer To The District

Date	Proceedings
	Of Maryland, Memo., Certificate, Filed.
June 17, 1986	Plff's Brief In Opposition To Defts' Motions to Dismiss Amended Complaints And Other Preliminary Motions, Certificate, With Appendix Etc., Filed.
July 2, 1986	Reply Memo, Of Maryland Deposit Ins. Fund In Support Of Its Motion To Dismiss, Or Alternatively to Transfer, Certificate, Filed.
July 3, 1986	Reply Memo. Of Glass & Assocs. to Plff's Brief In Opposition To Defts' Motion To Dismiss Amended Complaint, Certificate, Filed.
July 3, 1986	Reply Memo. Of Allen Feinberg In Support Of Motion To Dismiss, Certificate, Filed.
July 3, 1986	Reply Memo. In Support Of Motion By Former MSSIC Directors To Dismiss, Certificate, Filed.
July 3, 1986	Reply Memo. Of Jerome S. Cardin & Cardin & Cardin, P.A., Certificate, Filed.
July 3, 1986	Reply Memo. Of Venable, Baetjer & Howard In Support Of Motion To Dismiss, Certificate, Filed.
July 7, 1986	Reply Of Dennis E. Guidice To Plffs' Opposition To Defts' Preliminary Motions, Certificate, Filed.
July 15, 1986	Plffs' Supplemental Brief In Opposition To Defts' Motions To Dismiss And Alternative Preliminary Motions, Certificate, Filed.
August 12, 1986	Oral Argument Of 8/8/86 Re: Preliminary Motions. Ruling — MDIF's Request For

Date	Proceedings
	Dismissal Pursuant to 11th Amendment Immunity & Securities Act — Granted. MSSIC Directors' Request For Dismissal based On Certificates Of Deposit — Denied. All Other Matters Taken Under Advisement, Filed.
August 27, 1986	Transcript Of Hearing On August 8, 1986, Filed.
October 16, 1986	Plffs' Response To Submission By Maryland Deposit Ins. Fund Of *Levitt v. MDIF* (No. 85-4099, E.D.N.Y., 9/18/86), Certificate, Filed.
October 20, 1986	Letter To Hon. James T. Giles From Ralph S. Tyler, Asst. Atty Gen., Atty. For The Maryland Deposit Ins. Fund Corp. Dated (9/25/86) Re: Enclosed Is A Copy Of A 9/18/86 Opinion Of The Hon. L.D. Wexler Of U.S.D.C. For The E.D. Of New York In The Case Of *Levitt v. State Of Maryland Deposit Ins. Fund Corp.*, Which Relates Directly To The Pending Motions to Dismiss Or Transfer In Above Case, Filed.
October 28, 1986	Plffs' Second Supplemental Memo. In Opposition To Defts' Motions to Dismiss And Alternative Preliminary Motions, Certificate, Filed.
November 12, 1986	Response Of Venable, Baetjer, And Howard To Plff's Second Supplemental Memo. In Opposition To Defts' Motions To Dismiss And Alternatively Preliminary Motions, Certificate, Filed.
December 3, 1986	Supplemental Memo. Of Former MSSIC Directors In Support Of Transfer Motions, Certificate, Filed.

Date	Proceedings
February 17, 1987	Order That Defts' Motion To Transfer Is Granted, This Action Is Hereby Transferred To The District Of Maryland And The Clerk Of Court Is Directed To Forward The File Forthwith To That District, Etc., Filed. 2/18/87 Entered And Copies Mailed.
March 19, 1987	File W/Certified Copy Of Docket Trf To U.S. Dist. Court For Dist. Of Maryland.
March 23, 1987	Certified Copy Of Docket Entries With Pleadings 1 Through 134 Transferred From The United States District Court For The Eastern District Of Pennsylvania. Their Civil Action No. 86-0092.
October 1, 1987	Supplemental Memorandum Of Defendant Maryland Deposit Insurance Fund Corporation, Successor Of The Maryland Savings Share-Insurance Corporation And Receiver Of Old Court Savings And Loan Association, Inc. To Dismiss. (c/s)
October 1, 1987	Supplemental Memorandum Of Defendant Venable, Baetjer And Howard In Support Of Motion To [illegible]miss. (c/s)
October 1, 1987	Supplemental Memorandum Of Defendant *Glass And Associates* In Support Of Motion to Dismiss Amended Complaint. (c/s)
October 6, 1987	Supplemental Memorandum Of Former MSSIC Directors And Officers To Dismiss. (c/s)
December 4, 1987	Hearing On Pending Motions Held Before Black, J. (Tape: Cameron)
December 4, 1987	Oral Opinion Rendered By The Court (Black, J.).

Date	Proceedings
December 9, 1987	Order (Black, J.) Dated December 8, 1987 "GRANTING" Motions Of Defendants In Support Of Dismissal On The Grounds Of Abstention And "DISMISSING" Complaint Without Prejudice. (C/M 12/8/87 cd) (EOD 12/17/87 feh)
December 29, 1987	Notice Of Appeal Of Plaintiff. (d/s And topf Mailed 12-29-87 mrw) (Fee Paid) (c/m: 1-11-88 bmh)
January 14, 1988	Docketing Statement & TPOF Of Plaintiff.
February 2, 1988	Transcript (Excerpt) Of Proceedings Before The Court (Black, J.) On December 4, 1987. (Filed Separately.)
February 10, 1988	Transcript (Excerpt) Of Proceedings Before The Court (Black, J.) On December 4, 1987. (Filed Separately.)
March 8, 1988	Record On Appeal Transmitted To Clerk, U.S. Court Of Appeals For The Fourth Circuit, Richmond, VA (Volumes I Thru XVIII)
January 12, 1989	Attested Copy Of The Order Of Judgment Of The U.S. Court Of Appeals, For The Fourth Circuit, "AFFIRMING" The Judgment Of The District Court, Copy Of Opinion Attached Thereto.
February 3, 1989	Complete Record On Appeal Returned To U.S. District Court.

RELEVANT DOCKET ENTRIES

Francine Tafflin, et al. v. Jeffrey Levittt, et al.
Docket No. B-87-684

Date	Proceedings
January 7, 1986	Complaint Filed.
January 7, 1986	Jury Trial Demanded.
February 5, 1986	Deft. Glass & Assoc. P.A.'s Motion To Dismiss Or In Alternative Motion To Stay, Memo., Req. For Hearing, Cert. Of Service, Filed.
February 7, 1986	Deft. Maryland Deposit Ins. Fund's Motion To Dismiss Or To Transfer, Memo., Cert. Of Service, Filed.
February 24, 1986	Defts. Jeffrey A. Levitt, Karol Levitt & LCP Corporation's Motion To Dismiss Or In Alternative To Transfer, Memo., Request For Hearing, Cert. Of Service, Filed.
February 24, 1986	Jeffrey A. Levitt, Karol Levitt & LCP Corp.'s Motion To Stay, Memo., Request For Hearing, Cert. Of Service, Filed.
February 24, 1986	Jeffrey A. Levitt, Karol Levitt, & LCP Corp.'s Motion To Consolidate, Request For Hearing, Cert. Of Service, Filed.
February 28, 1986	Order That Tafflin v. Levitt, CA 86-90 & Tafflin v. Levitt 86-92 Be Consolidated For Limited Purpose Of Determining Preliminary Motions, Filed. 3/3/86 Entered & Copies Mailed.
March 3, 1986	Deft. Jerome Cardin & Cardin & Cardin, P.A.'s Motion To Dismiss, Memo, Cert. Of Service, Filed.
March 3, 1986	Deft.'s Allan H. & Rosemary Pearlstein &

Date	Proceedings
	Robt. D. Pearlstein's Motion To Stay, Req. For Hearing, Memo., Cert. Of Service, Filed.
March 3, 1986	Deft.'s Allan H. & Rosemary Pearlstein & Robt. D. Pearlstein's Motion To Dismiss Or Transfer, Memo., Cert. Of Service, Filed.
March 11, 1986	Amended Complaint Filed.
March 18, 1986	Supplemental Exhibits To Memorandum Of Law In Support Of Motion Of Defts. Jerome S. Cardin & Cardin & Cardin, P.A. to Dismiss, Cert. Of Service, Filed.
March 20, 1986	Deft. Allen Feinberg's Motion to Dismiss Or In Alternative To Transfer Or to Stay, Request For Hearing, Filed.
March 28, 1986	Deft. Dennis E. Guidice's Motion to Dismiss, Stay, Consolidate Or Transfer, Req. For Hearing, Cert. Of Service, Filed.
April 4, 1986	Deft. David Uhlfelder's Motion To Dismiss Amended Complaint Memo., Cert. Of Service, Filed.
April 7, 1986	Affidavit Of David Uhlfelder Re: Motion To Dismiss Amended Complaints, Filed.
April 11, 1986	Order That The Requirement That Plffs. File Their Motion For Class Certification Pursuant To FRCP 23(a)(b), LR 27(c) Is Stayed For A Period Of 120 Days, Defts. Shall File Any Preliminary Motions Or Amended Preliminary Motions Triggered By The Filing of Plff.'s Amended Complaint By 5/9/86, Plff. Has Until 6/6/86 to File Any Omnibus Response To Defts.' Motions Specifying Defenses Which Are Applicable To Each Deft. Defts. Replies 6/18/86, Plffs.

Date	Proceedings
	Further Reply Briefs 6/30/86, Oral Argument 8/1/86, 9:00 A.M. CTRM 8B, Filed. 4/11/86 Entered & Copies Mailed.
April 16, 1986	Defts. Allan Pearlstein, Rosemary Pearlstein & Robt. Pearlstein's Motion To Dismiss And/Or Transfer In Response To Amended Complaint, Memo., Cert. Of Service, Filed.
May 7, 1986	Defts. Jeffrey A. Levitt, Karol Levitt & LCP Corp.'s Motion To Stay Proceedings Memo., Req. For Hearing, Cert. Of Service, Filed.
May 7, 1986	Defts. Jeffrey A. Levitt, Karol Levitt, & LCP Corp.'s Motion To Dismiss Amended Complaint Or In Alternative To Transfer, Memo., Req. For Hearing, Cert. Of Service, Filed.
May 8, 1986	Deft. Hogg's Motion To Dismiss Or In Alternative To Transfer Proceedings To Dist. Of Maryland, Memo., Cert. Of Service, Filed.
May 8, 1986	Deft. Maryland Deposit Ins. Fund's Supplemental Memorandum In Support Of Motion To Dismiss Or Alternatively To Transfer, Appendices, Cert. Of Service, Filed.
May 9, 1986	Deft. Glass & Assoc. P.A.'s Motion to Dismiss Counts I, II, IV, V & IX Of Amended Complaint, Memo., Cert. Of Service, Filed.
May 9, 1986	Deft. Venable, Baetjer & Howard's Motion To Dismiss Amended Complaints, Memo., Cert. Of Service, Filed.

Date	Proceedings —
May 9, 1986	Defts. Jerome S. Cardin and Cardin & Cardin, P.A.'s Motion To Dismiss, Memo., Cert. Of Service, Filed.
May 9, 1986	Defts. MSSIC (Maryland Savings Share Ins. Co.) Motion To Dismiss, Memo., Exhibit Cert. Of Service, Filed.
May 9, 1986	Deft. Allen Feinbert's Motion To Dismiss Or In Alternative Transfer Or Stay, Affidavit, Memo., Cert. Of Service, Filed.
May 12, 1986	Deft. Terry Neifeld's Supplemental Memorandum Of Points & Authorities In Support Of Motion By Former MSSIC Directors To Dismiss, Cert. Of Service, Filed.
May 15, 1986	Deft. Trice's Motion To Dismiss Or In Alternative To Transfer Proceedings To Dist. Of Maryland, Memo., Cert. Of Service, Filed.
June 17, 1986	Plff.'s Brief In Opposition To Defts.' Motion To Dismiss Amended Complaints & Other Preliminary Motions, Appendix, Addendums, Cert. Of Service, Filed.
July 2, 1986	Deft. Maryland Deposit Ins. Fund's Reply Memorandum In Support Of Its Motion To Motion To Dismiss Or Alternatively To Transfer, Cert. Of Service, Filed.
July 3, 1986	Deft. Glass & Assoc.'s Reply Memorandum to Plff.'s Brief In Opposition To Deft.'s Motion To Dismiss Amended Complaint, Cert. Of Service, Filed.
July 3, 1986	Deft. Allen Feinberg's Reply Memorandum In Support Of Motion To Dismiss, Cert. Service, Filed.
July 3, 1986	Reply Memorandum In Support Of Motion

Date	Proceedings
	By Former MSSIC Directors To Dismiss, Cert. Of Service, Filed.
July 3, 1986	Defts. Jerome S. Cardin & Cardin & Cardin, P.A.'s Reply Memorandum, Cert. Of Service, Filed.
July 3, 1986	Deft. Venable, Baetjer & Howard's Reply Memorandum In Support Of Motion To Dismiss, Cert. Of Service, Filed.
July 7, 1986	Deft. Dennis E. Guidice's Reply to Plffs.' Opposition to Defts.' Preliminary Motions, Cert. Of Service, Filed.
July 16, 1986	Plffs.' Supplemental Brief In Opposition To Defts.' Motions To Dismiss & Alternative Preliminary Motions & Appendix, Filed.
August 12, 1986	Oral Argument Of 8/8/86 Re: Preliminary Motions, C.A.V., Filed. (ER, Sierra, McC)
October 16, 1986	Plffs.' Response To Submission By Deft. Maryland Deposit Ins. Fund Of Levitt v. MDIF, No. 85-4099 EDNY, 9/18/86, Cert. Of Service, Filed.
October 20, 1986	Letter To Judge Giles From Ralph S. Tyler, Esq. Atty. For Maryland Deposit Ins. Re: Enclosed Is A Copy Of A 9/18/86 Opinion Of The Honorable Leonard D. Wexler Of USDC For EDNY Levitt v. State Of Maryland Deposit Ins. Fund Corp. CV85-4099, Which Relates To The Pending Motions to Dismiss Or Transfer In Above Case, Filed.
October 28, 1986	Plffs.' Second Supplemental Memorandum In Opposition to Defts.' Motions to Dismiss & Alternative Preliminary Motions, Cert. Of Service, Filed.

Date	Proceedings
November 12, 1986	Defts. Venable, Baetjer & Howard's Response To Plffs.' Second Supplemental Memorandum In Opposition To Defts.' Motions To Dismiss & Alternative Preliminary Motions, Cert. Of Service, Filed.
December 3, 1986	Supplemental Memorandum Of Former MSSIC Directors In Support Of Transfer Motions, Cert. Of Service, Filed.
February 17, 1987	Order That Defts.' Motion To Transfer Is Granted. This Action Is Transferred To The District Of Maryland And The Clerk Of Court Is Directed To Forward The File Forthwith to That District. Etc., Filed. 2/18/87 Entered And Copies Mailed.
March 24, 1987	Certified Copy Of Docket Entries With Pleadings 1 Through 35 Transferred From The United States District Court For The Eastern District Of Pennsylvania. Their Civil Action No. 86-0090.
October 1, 1987	Supplemental Brief Of Plaintiffs In Opposition To Motions Of Defendants' To Dismiss Amended Complaints And Other Preliminary Motions. (c/s)
October 1, 1987	Reply Memorandum Of Defendants Jerome S. Cardin And Cardin & Cardin, P.A. (c/s)
October 5, 1987	Supplemental Memorandum Of Defendant Venable, Baetjer And Howard In Support Of Motion To Dismiss. (c/s)
October 6, 1987	Supplemental Memorandum Of Former MSSIC Directors And Officers To Dismiss. (c/s)
October 7, 1987	Reply Of Defendants Allan Pearlstein,

Date	Proceedings
	Rosemary Pearlstein, Robert D. Pearlstein And Light Street Partnership. (c/s)
October 8, 1987	Supplemental Memorandum Of Defendant *Glass* And *Associates* In Support Of Motion To Dismiss Amended Complaint. (c/s) (COPY)
October 14, 1987	Reply Memorandum Of Defendant *DAVID UHLFELDER*. (c/s)
December 4, 1987	Hearing On Pending Motions Held Before Black, J. (Tape: Cameron)
December 4, 1987	Oral Opinion Rendered By The Court (Black, J.).
December 9, 1987	Order (Black, J.) Dated December 8, 1987 "GRANTING" Motions Of Defendants In Support Of Dismissal on the Grounds Of Abstention And "DISMISSING" Case Without Prejudice. (C/M 12/9/87 cd) (EOD 12/17/87 feh)
December 29, 1987	Notice of Appeal Of Plaintiff. (d/s And tpof Mailed 12-29-87 mrw) (c/m: 1-11-88 bmh)
January 15, 1988	Copy Of Docketing Statement, Transcript Order Form And Attachments.
March 8, 1988	Record on Appeal Transmitted To Clerk, U.S. Court Of Appeals For The Fourth Circuit, Richmond, VA (Volumes I Through XVIII) (Sent With B-87-668)
January 12, 1989	Attested Copy Of The Order Of Judgment (Copy) Of the U.S. Court Of Appeals For The Fourth Circuit "AFFIRMING" The Judgment Of the District Court. (Original Filed In B87-668).
February 3, 1989	Completed Record On Appeal Returned To U.S. District Court.

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANCINE TAFFLIN, 106 West Cheltenham Avenue, Philadelphia, Pennsylvania 19120,	:	CIVIL ACTION NO. 86-0090
and	:	
SEYMOUR ZUCKERMAN, 834 Columbus Drive, Teaneck, New Jersey 07666,	:	
and	:	
ERIS ZUCKERMAN, 834 Columbus Drive, Teaneck, New Jersey 07666,	:	
and	:	
RENALEE SELVIN, 210 West 70th Street, New York, New York 10023	:	
and	:	
JOAN ZUCKERMAN, 210 West 70th Street, New York, New York 10023,	:	
and	:	
SYLVIA ZUCKERMAN, 1705 Caton Avenue, Brooklyn, New York,	:	
and	:	

SEYMOUR ZUCKERMAN,
Executor of the Estate of Samuel Zuckerman,
834 Columbia Drive,
Teaneck, New Jersey 07666,

and

GEORGE R. LYON,
511 Wallace Street,
Birmingham, Michigan 48009,

and

GEORGE C. LYON,
1317 Smith Street,
Royal Oak, Michigan 48073,

and

PETER M. LYON,
511 Wallace Street,
Birmingham, Michigan 48009,

and

BRUCE K. LYON,
511 Wallace Street,
Birmingham, Michigan 48009,

and

ELIZABETH A. LYON,
511 Wallace Street,
Birmingham, Michigan 48009,

and

GEORGE R. LYON and MARY G. LATHROP, Personal Representatives of the Estate of George M. Lyon,
511 Wallace Street,
Birmingham, Michigan 48009,

and

KENT H. BUTCHER,
49 Maple Dale Avenue,
Glen Burnie, Maryland 21068,

and

STANLEY Z. FELSENBERG, M.D.,
Personal Representative of the Estate of Minnie Felsenberg,
6350 Red Cedar Place, Apt. 312,
Baltimore, Maryland 21209,

and

MARGARET GRAVES,
211 Wicklow Avenue,
Ferndale, Maryland 21061,

and

THURMAN L. GRAVES,
211 Wicklow Avenue,
Ferndale, Maryland 21061,

and

SANDRA L. PLETKA,
19 Mountain Road,
Linthicum, Maryland 21090,

and

WINDELL R. CARTER, JR.,
6409 North 10th Street,
Philadelphia, Pennsylvania 19126,

and

CATHERINE CARTER,
6409 North 10th Street,
Philadelphia, Pennsylvania 19126,

and

RIO GRANDE SAVINGS AND LOAN ASSOCIATION,
901 First Avenue,
Monte Vista, Colorado,

and

ENTERPRISE EQUIPMENT CO., INC.,
857 Washington Street,
East Weymouth, MA 02189,

and

GERTRUDE DURSO,
William Penn House, Apt. 2808,
1919 Chestnut Street,
Philadelphia, PA 19103,

and

CARMEN R. GOLDINGS,
65 Sterling Street,
West Newton, MA 02165,

and

SARAH M. GOLDINGS,
1284 Beacon Street,
Brookline, MA 02146,

and

HERBERT J. GOLDINGS,
65 Sterling Street,
West Newton, MA 02165,

and

ETHAN D. GOLDINGS,
65 Sterling Street,
West Newton, MA 02165,

and

CLELIA S. GOLDINGS,
65 Sterling Street,
West Newton, MA 02165,

and

DORIS KONIG,
315 West 86th Street, Suite 15B,
New York, NY 10024,

and

MITCHELL W. LANDY,
3901 Conshohocken Avenue,
Apt. 220,
Philadelphia, PA 19131,
PLAINTIFFS,

v.

JEFFREY A. LEVITT,
11408 Woodland Avenue,
Lutherville, Maryland 21093,

and

LCP CORPORATION,
16 South Calvert Street,
Baltimore, Maryland 21201,

and

ALLAN H. PEARLSTEIN,
3704 Bretton Way,
Pikesville, Maryland 21208,

and

JEROME S. CARDIN,
6615 Reisterstown Road,
Baltimore, Maryland 21215,

and

LIGHT STREET PARTNERSHIP,
16 South Calvert Street,
Baltimore, Maryland 21201,

and

ALLEN FEINBERG,
3303 Garrison Farms Road,
Baltimore, Maryland 21208,

and

DAVID UHLFELDER,
1515 Reisterstown Road,
Baltimore, Maryland 21208,

and

ROBERT D. PEARLSTEIN,
10806 Long Acre Lane,
Stevenson, Maryland 21143,

and

SAMUEL SHOUBIN,
2902 Terry Drive,
Baltimore, Maryland 21209,

and

DENNIS E. GUIDICE,
1612 Ross Road,
Forest Hill, Maryland 21050,

and

KAROL LEVITT,
11408 Woodland Avenue,
Lutherville, Maryland 21093,

and

ROSEMARY PEARLSTEIN,
3704 Bretton Way,
Pikesville, Maryland 21208,

and

OLD COURT SAVINGS & LOAN, INC.,
16 South Calvert Street,
Baltimore, Maryland 21201,
or, c/o MARYLAND DEPOSIT INSURANCE FUND CORPORATION, RECEIVER,
114 E. Lexington Street,
Baltimore, Maryland 21102,

and

MARYLAND SAVINGS SHARE INSURANCE CORP.,
115 East Lexington Street,
Baltimore, Maryland 21202,

and

MARYLAND DEPOSIT INSURANCE FUND CORPORATION,
114 E. Lexington Street,
Baltimore, Maryland 21102,

and

CHARLES C. HOGG, II,
6105 Buckingham Manor,
Baltimore, Maryland 21210, or
114 East Lexington Street,
Baltimore, Maryland 21202,

and

PAUL B. TRICE, JR.,
114 East Lexington Street,
Baltimore, Maryland 21202,

and

GEORGE W. H. PIERSON,
400 East Pratt Street,
Baltimore, Maryland; or
300 Old Trail,
Baltimore, Maryland 21212,

and

JEROME F. DOLIVKA,
1613 Chesaco Avenue,
Baltimore, Maryland 21237,

and

FRANCES F. ANDERSON,
900 Crain Highway South,
Baltimore, Maryland 21061,

and

MICHAEL J. DIETZ,
7034 Dunbar Road,
Baltimore, Maryland 21228,

and

LEONARD BASS,
3911 Noyes Circle,
Randallstown, Maryland 21133, or
Munsey Building,
Baltimore, Maryland 21202, or
2421 Forest Green Road,
Pikesville, Maryland 21208,

and

JOHN C. DONOHUE, SR.,
5603 Roland Avenue,
Baltimore, Maryland 21210,

and

HENRY R. ELSNIC,
21 Buchannon Road,
Woodbrook, Maryland 21217,

and

JOHN D. FAULKNER, JR.,
114 East Lexington Street,
Baltimore, Maryland 21202,

and

JAMES D. LAUDEMAN,
3838 Roland Avenue,
Baltimore, Maryland,

and

TERRY L. NEIFELD,
2911 Erie Avenue,
Carney, Maryland,

and

GLASS AND ASSOCIATES, P.A.,
2 Hopkins Plaza,
714 Mercantile Bank & Trust Building,
Baltimore, Maryland 21201,

and

CARDIN AND CARDIN, P.A.,
6615 Reisterstown Road,
Baltimore, Maryland 21215,

and

VENABLE, BAETJER AND HOWARD,
1800 Mercantile Bank & Trust Building,
2 Hopkins Plaza,
Baltimore, Maryland 21201,
DEFENDANTS.

AMENDED COMPLAINT

1. Plaintiffs' bring this action individually and on behalf of a class consisting of all persons who, during the period from September 1, 1982 through May 13, 1985 purchased or renewed Certificates of Deposit of Old Court Savings & Loan, Inc. ("Old Court"); and who either held such Certificates of Deposit on May 13, 1985, or redeemed such Certificates immediately prior thereto and suffered a penalty of loss of all interest accrued on said Certificates of Deposit for early withdrawal, their heirs, executors, successors and assigns (the "Class"), against defendants for violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78j(b), and Rule 10b-5 promulgated by the Securities and Exchange Commission thereunder; the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO") 19 U.S.C. §§1961-1968; Section 11-301 of the Maryland Securities Act ("Maryland Act"), Md. Corps. & Assns. Code Ann. §11-301; applicable provisions of securities laws of the several states in which various plaintiffs live, including Michigan, Mich. Comp. Laws, §451.501; New Jersey, N.J. Rev. Stat. §49:3052; New York, N.Y. Gen. Bus. Law §339-a; and Pennsylvania, 70 P.S. §1-401; and the common law of fraud, deceit, misrepresentation, malfeasance, breach of contract and conversion and violation of fiduciary obligations. In the alternative, plaintiff's individual claims and claims on behalf of those similarly situated may require subclasses represented by various named plaintiffs.

2. The amount in controversy exceeds $10,000 exclusive of interest and costs.

3. This Court has jurisdiction of this action pursuant to Section 27 of the Exchange Act, as amended, 15 U.S.C. §78aa; Section 1331 and 1337 of the Judicial Code, 28 U.S.C. §1331, 28 U.S.C. §1337; 18 U.S.C. §1964 and principles of pendent jurisdiction.

4. Many of the acts and transactions constituting the violations of the Exchange Act by defendants alleged herein, including, *inter alia,* the distribution and dissemination of false and misleading information (both written and oral) regarding Old

Court and Maryland Savings Share Insurance Corporation ("MSSIC"), and the several instances of racketeering activities alleged herein, occurred in the Eastern District of Pennsylvania, and certain of the claims asserted herein arose in this district. Many such acts occurred in the Commonwealth of Pennsylvania, the States of New Jersey, New York, Michigan, Maryland and in all probability virtually all other states and the District of Columbia.

5. The tort claims arose in the State of Maryland and in every state and the District of Columbia in which the named plaintiffs and members of the Class reside as well as in this district.

6. Each of the defendants does or transacts business in this district.

7. Each of the defendants either directly or indirectly disseminated advertising material in this district through the placement of advertisements in newspapers which defendants knew were regularly sold, distributed and circulated in this district including the Philadelphia Inquirer, the New York Times, and The Wall Street Journal which offered for sale to citizens and residents of this district, as well as other persons, Certificates of Deposits and other securities sold by Old Court and/or other Maryland savings and loan institutions insured by MSSIC.

8. Venue is proper in this district pursuant to Section 27 of the Exchange Act, 15 U.S.C. §78aa; 28 U.S.C. §1391(a); 28 U.S.C. §1391(b) and 28 U.S.C. §1391(c); and 18 U.S.C. §1965.

9. In connection with the acts, conduct, combinations and conspiracies alleged in this Complaint including, *inter alia,* the dissemination of false and misleading communications and racketeering activities, the defendants directly and indirectly used the means and instrumentalities of interstate commerce, including the United States mail and interstate telephone communication.

10. The Certificates of Deposit sold by Old Court and purchased by the named plaintiffs and the putative class members are securities within the meaning of Section 10(b) of the

Exchange Act, Rule 10b-5 promulgated thereunder, and applicable state securities laws.

11. The Certificates of Deposit offered for sale by Old Court competed for investment funds with other securities including, but not limited to, stocks, bonds, money market funds, mutual funds and other investment contracts offered by other financial institutions and were advertised for sale in the same contexts as those other securities in newspapers and otherwise.

12. The only deposits, accounts or investments sold by Old Court to residents of the District of Columbia and states other than Maryland were its Certificates of Deposit. Such Certificates had various terms to maturity including one year, five years, 90 days, and 180 days. All the Old Court Certificates of Deposit carried a penalty of 100% loss of interest for early withdrawals.

13. Virtually all sales of Certificates of Deposit from Old Court to non-residents of Maryland were made through the United States mails.

14. The sale of Certificates of Deposit by Old Court at high interest rates, even higher than those offered for sale by other Maryland savings and loan institutions, was widely publicized in Maryland through numerous advertisements in the Baltimore Evening Sun, and Maryland local newspapers, as well as other newspapers read by citizens of Maryland; in particular, the Washington Post, the New York Times and the Wall Street Journal; as well as through direct and indirect communications with Old Court and other savings and loan institutions in Maryland. This information became public knowledge among citizens of Maryland considering profitable and safe investments.

15. The widespread nature of Old Court's offer to sell Certificates of Deposit at high interest rates initiated or accelerated a virtual price war among Maryland savings and loan institutions competing for investors' money through the sale of Certificates of Deposit. The aggressive manner in which Old Court marketed Certificates of Deposit created a market of public information of the type generally associated with the sale of listed stocks, bonds and other securities; and residents of

Maryland, as well as residents of nearby states who had occasion to visit Maryland on a regular basis for business or recreational purposes, such as people who owned boats moored in Maryland, were aware of Old Court's high interest rates. The activities of Old Court in this regard are the equivalent of "fraud on the marketplace".

16. Plaintiff, Francine Tafflin is an individual citizen of the State of Pennsylvania who resides at 106 West Cheltenham Avenue, Philadelphia, Pennsylvania 19120.

17. She purchased Certificates of Deposit from Old Court as identified below:

Certificate No.	Date of Purchase	Amount
04-700350-6	10/28/83	$50,000
04-703045-3	10/18/84	$20,000

The interest rate agreed upon by Francine Tafflin and Old Court at the date she purchased Certificate No. 04-703045-3 was 13% (14.1% compounded daily). The interest rate agreed upon for the earlier Certificate purchased in 1983 and renewed at maturity as set forth below was 11.3% for the original period and 14.1% for the renewal period.

18. Pursuant to the terms of Certificate No. 04-700350-6 purchased by plaintiff Francine Tafflin on October 28, 1983, Ms. Tafflin collected the interest which accrued up to the original date of maturity, October 28, 1984, and at that time renewed the Certificate for an additional year relying on assurances by Old Court that a renewal of the Certificate would also be fully insured and carried no risk of loss.

19. The Certificates of Deposit purchased by Francine Tafflin identified in paragraph 14 above had maturity dates of one year from the date of purchase with an option to renew at the end of that period. Certificate of Deposit 04-703045-3 matured on or about October 18, 1985 and Certificate of Deposit 04-700350 matured first on October 28, 1984 and again, after renewal, on October 28, 1985. Ms. Tafflin was unable to receive either interest or principal on those Certificates at the dates of maturity although interest was accrued at the agreed upon rate

prior thereto. For the period between the maturity date of these Certificates and November 8, 1985 interest on them was accrued at the rate of 5½ percent, rather than the agreed upon rate of interest, and from November 8, 1985 to date, no interest has been accrued on these Certificates and plaintiff has been denied her rights to withdraw any funds from Old Court for the reasons stated later in the Complaint.

20. Although title to the Certificates of Deposit purchased by Francine Tafflin was in her name, part of the funds used to purchase these Certificates belonged to her seventy-eight year old mother, Sarah Tafflin, with whom she resides, and Sarah Tafflin is in part the beneficial owner of these Certificates of Deposit. The funds used to purchase these Old Court Certificates of Deposit constituted virtually the entire life savings of this plaintiff and her mother.

21. Plaintiff Francine Tafflin learned of the sale of Old Court Certificates of Deposit from the Philadelphia Inquirer, a newspaper regularly circulated in this district, which she read in this district. She made interstate telephone calls and engaged in telephone conversations with representatives of Old Court, MSSIC and the Division of Savings and Loan of the State of Maryland, all of whom assured her of the safety of her investment in Old Court Certificates of Deposit. In response to her inquires she received through the United States mail written material from Old Court and MSSIC which described these Certificates as fully insured and risk free.

22. Plaintiffs allege, on information and belief, that many other citizens of Pennsylvania including citizens and residents of this district (who are class members) purchased Old Court Certificates of Deposit through similar means.

23. Plaintiffs Seymour Zuckerman and Eris Zuckerman are individual citizens of the State of New Jersey who reside at 834 Columbus Drive, Teaneck, New Jersey 07666. Plaintiffs Renalee Selvin and Joan Zuckerman are individual citizens of the State of New York who reside at 210 West 70th Street, New York, New York 10023; and plaintiff Sylvia Zuckerman is an individual citizen of the State of New York who resides at 1705

Caton Avenue, Brooklyn, New York (hereinafter sometimes referred to collectively as the Zuckerman Plaintiffs.)

24. Seymour Zuckerman is the executor of the Estate of Samuel Zuckerman, his father.

25. Plaintiffs Seymour, Eris, Joan and Sylvia Zuckerman, Renalee Selvin and Samuel Zuckerman, now deceased, either individually, jointly or as trustee for another, purchased Certificates of Deposit from Old Court as identified below:

Purchaser	Certificate No.	Date of Purchase	Amount
Renalee Selvin and Seymour Zuckerman	04-703974-3	12/10/84	$30,000
Joan Zuckerman and Seymour Zuckerman	04-703975-0	12/10/84	$25,000
Seymour Zuckerman and Eris Zuckerman	04-703977-6	12/10/84	$80,000
Seymour Zuckerman, trustee for Eris Zuckerman	04-704767-0	1/22/85	$90,000
Seymour Zuckerman, trustee for Joan Zuckerman	04-704765-4	1/22/85	$31,902.23
Seymour Zuckerman, trustee for Renalee Selvin	04-704766-2	1/22/85	$31,902.23
Samuel Zuckerman and Seymour Zuckerman	04-703976-8	12/10/84	$80,000
Seymour Zuckerman, trustee for Samuel Zuckerman	04-704769-6	1/22/85	$90,000
Samuel Zuckerman, trustee for Seymour Zuckerman	04-704770-0	1/22/85	$53,170.41
Samuel Zuckerman, trustee for Sylvia Zuckerman	04-704768-8	1/22/85	$90,000

The interest rates on the above Certificates of Deposits were 12.25%-13.22% on the first three Certificates; 11.75-12.70% on the next three Certificates; 12.25-13.22% on the next Certificate; and 11.75%-12.70% on the last three Certificates.

26. Each of the Certificates purchased by the Zuckerman plaintiffs identified in paragraph 22 above had a maturity date of one year following its purchase, with an option to renew for an additional period of time.

27. On May 20, 1985, the owners of the foregoing Certificates (with the exception of the last two listed Certificates) withdrew $1,000 from each account. The Zuckerman Plaintiffs have been unable to withdraw any further money (principal or interest) on the foregoing Certificates of Deposit including those which have already matured and are payable on demand by the terms thereof, and as of November 8, 1985, no interest has been accrued on any of the foregoing Certificates for the reasons stated later in this Complaint. The Zuckerman Plaintiffs believe that they will be unable to redeem the Certificates which mature on January 22 for the same reason.

28. Plaintiff Seymour Zuckerman on behalf of himself and the other Zuckerman Plaintiffs learned of the sale of Old Court Certificates from the New York Times, which is regularly circulated in New York and New Jersey, and which he read and received in either New York or New Jersey; made interstate telephone calls to representatives of Old Court, MSSIC and the Division of Savings and Loan of the State of Maryland, and received in response to his inquires about Old Court written material through the United States mails including financial statements of Old Court which are now known to be false and upon which he relied. In response to all inquiries, plaintiff Seymour Zuckerman was assured, both orally and through the written material which he received, that Old Court Certificates of Deposit were risk-free and fully insured.

29. Plaintiffs George R. Lyon, Peter M. Lyon, Bruce K. Lyon, Elizabeth A. Lyon, the Estate of George M. Lyon by George R. Lyon and Mary G. Lathrop as personal representatives are individual citizens of the State of Michigan who reside at 511 Wallace Street, Birmingham, Michigan 48009, and

plaintiff George C. Lyon is an individual citizen of the State of Michigan who resides at 1317 Smith Street, Royal Oak, Michigan 48073 (hereinafter collectively referred to as the Lyon Plaintiffs).

30. The Lyon Plaintiffs either individually, jointly or as the personal representatives of the Estate of George R. Lyon purchased Certificates of Deposit from Old Court as identified below:

Purchaser	Certificate No.	Date of Purchase	Amount
George C. Lyon and Peter M. Lyon and Bruce K. Lyon	04-303528-0	3/7/85	$50,947.71
George C. Lyon and Peter M. Lyon and Bruce K. Lyon	04-303527-2	3/7/85	$50,000.00
George R. Lyon and Peter M. Lyon and Bruce K. Lyon	04-303367-2	3/1/85	$50,500.00
George R. Lyon and Elizabeth A. Lyon and George C. Lyon	04-303368-0	3/1/85	$50,500.00
Estate of George M. Lyon and by George R. Lyon and Mary G. Lathrop, personal representatives	04-303859-7	4/8/85	$ 3,427.76

31. All of the foregoing Certificates owned by the Lyon plaintiffs, by their terms matured 91 days from the date of purchase, and included the right to renew for an additional 91 days. The interest rate on each of the Certificates identified in paragraph 27 above, except Certificate No. 04-303859-7, was 11½%. The interest rate on Certificate No. 04-303859-7 was 11¼%. Certificate No. 04-303367-2 and Certificate No. 04-303368-0 were renewed on their original maturity date, May 31, 1985, and Certificate No. 04-303527-2 and Certificate No. 04-303528-0 were renewed on their original maturity date, June 6, 1985, for an additional 91 day period, and interest on these Certificates was accrued at the agreed upon rate of 11½% prior to August 30, 1985 and September 5, 1985, respeetively.

Subsequent thereto, and through November 8, 1985, interest on the aforementioned Certificates was accrued at 5½%. Certificate No. 04-303859-7, which matured on July 8, 1985, was not renewed at all by Old Court, but was converted immediately into a regular savings account and interest at the rate of 5½% was accrued from that date through November 8, 1985. No interest was accrued for any period after November 8, 1985 on any of the Lyon Plaintiffs' Certificates. The Lyon Plaintiffs have been unable to redeem or collect any interest or principal on the Certificates of Deposit referred to herein for the reasons set forth later in this Complaint.

32. Plaintiff George R. Lyon learned of the sale of Certificates of Deposit from advertisements in the New York Times, a newspaper with national circulation which he read regularly in his hometown in Michigan. He on his own behalf and on behalf of the other Lyon Plaintiffs made inquires by interstate telephone calls to Old Court, MSSIC and the Division of Savings and Loan of the State of Maryland, and received in response various written material, including financial statements of Old Court. He was assured by representatives of both Old Court and MSSIC orally and in the written materials he received that Old Court Certificates of Deposit were safe investments and fully insured from all risk of loss.

33. Plaintiffs Windell R. Carter, Jr. and Catherine Carter are individual citizens of the State of Pennsylvania who reside at 6409 North 10th Street, Philadelphia, Pennsylvania 19126.

34. Plaintiff Windell Carter and Catherine Carter purchased Certificates of Deposit from Old Court as identified below:

Certificate No.	Date of Purchase	Amount
04-704147-6	12/17/84	$10,000
04-075560-6	02/14/85	$10,000
04-703002-7	10/15/85	$10,000
04-704604-2	01/15/85	$10,000
04-703469-1	11/15/84	$10,000
04-701288-8	06/18/84	$10,000

Certificate No.	Date of Purchase	Amount
06-701135-7	05/07/85	$20,000
04-705953-9	03/04/85	$70,000

35. All of the foregoing Certificates by their terms matured one year from the date of purchase, with an option to renew for an additional period of time. The Carter plaintiffs have been unable to withdraw any money on the foregoing Certificates including those which have already matured and are payable on demand by the terms thereof, and as of November 8, 1985 no interest has been accrued on any of the foregoing Certificates for the reasons stated later in this Complaint.

36. Plaintiff Catherine Carter, as executor of the estate of Barbara Carter, purchased a Certificate of Deposit on June 11, 1984, No. 04-701274-1, in the amount of $63,525.57. The Certificate had a stated term of one year and matured on June 11, 1985. Mrs. Carter was unable to receive interest or principal on her Certificate at the date of maturity although interest was accrued at the agreed upon rate prior thereto. For the period between the maturity date of this Certificate and November 8, 1985 interest was accrued at the rate of 5½ percent, rather than the higher agreed upon rate of interest, of approximately 12 percent; and from November 8 to date, no interest has been accrued on this Certificate and plaintiff has been denied her rights to withdraw any funds from Old Court for the reasons stated later in the Complaint.

37. Plaintiff Windell Carter on behalf of himself and Catherine Carter learned of the sale of Old Court Certificates from newspapers regularly circulated in Philadelphia which he received and read there; made interstate telephone calls to representatives of Old Court and MSSIC and received in response to his inquiries about Old Court written material through the United States mails, including financial statements of Old Court which are now known to be false and upon which be relied. In response to all of his inquiries, Windell Carter was assured, both orally and through written material which he received, that Old Court Certificates of Deposit were risk free and fully insured.

38. Specifically, Mr. Carter was advised by a letter from MSSIC that MSSIC regulations were enforced and precluded any fraudulent activity by member associations; that MSSIC "guarantee[d] payment of 100 cents on the dollar, to the limit of $100,000 per account"; that no MSSIC depositor had ever lost money; and that MSSIC was a "very stringent and full-time organization." These representations were typical of those made by letter and telephone conversation to other Old Court depositors who inquired of MSSIC as to the safety of their deposits in Old Court.

39. Plaintiff Kent H. Butcher is an individual citizen of the State of Maryland who resides at 49 Maple Dale Avenue, Glen Burnie, Maryland 21068. On September 4, 1984 he purchased a Certificate of Deposit, No. 02-702659-3, in the amount of $4,000.00. The Certificate had a stated term of one (1) year and matured on September 5, 1985. Mr. Butcher was unable to receive interest or principal on this Certificate at the date of maturity although interest was accrued at the agreed upon rate prior thereto. For the period between the maturity date of this Certificate and November 8, 1985 interest was accrued at the rate of 5½ percent, rather than the higher agreed upon rate of interest, of approximately 14 percent; and from November 8, 1985 to date, no interest has been accrued on this Certificate and plaintiff has been denied his rights to withdraw any funds from Old Court for the reasons stated later in the Complaint.

40. Plaintiff Kent Butcher was aware of the sale of Old Court Bank Certificates of Deposit through newspaper advertisements and/or other information, written and oral, available to him from Old Court, MSSIC and other Maryland savings and loan institutions, and the information of the marketplace for the sale of such investments. Mr. Butcher was assured of the risk-free nature of such investments created by the virtually universal belief among residents of Maryland that MSSIC was a governmental agency and insured such Certificates up to $100,000 per account in much the same way as Federal Deposit Insurance Corporation (FDIC) and Federal Savings and Loan Insurance Corporation (FSLIC) insured their members' deposits. This incorrect belief was caused by the dissemination of false

and misleading information set forth in brochures and other written material distributed by Old Court, MSSIC and other Maryland savings and loan institutions which were members of MSSIC.

41. Stanley Z. Felsenberg, M.D., is an individual citizen of the State of Maryland who resides at 6350 Red Cedar Place, Apt. 312, Baltimore, Maryland 21209. On December 13, 1984 he purchased on behalf of the Estate of Minnie Felsenberg, of which he is the Personal Representative, an Old Court Investment Certificate in the amount of $20,671.03. The Certificate had a stated term of one year and matured on December 14, 1985. Dr. Felsenberg has been unable to withdraw any funds (principal or interest) on the Certificate of Deposit, which has already matured and is payable on demand by the terms thereof, and as of November 8, 1985, no interest has been accrued on the Certificate for the reasons stated later in this Complaint.

42. Plaintiff Felsenberg learned of the sale of Old Court Certificates of Deposit in much the same way as did plaintiff Kent Butcher. Because his purchase was for an estate of a decedent he relied in particular on the risk-free nature of the Certificates as represented by Old Court, MSSIC and other savings and loan member institutions of MSSIC. He, as well as virtually every other investor or depositor in Old Court, believed that MSSIC was a governmental agency.

43. Plaintiffs Thurman L. Graves and Margaret B. Graves are citizens of the State of Maryland and reside at 211 Wicklow Avenue, Ferndale, Maryland. Plaintiff Sandra Pletka is a citizen of the State of Maryland and resides at 19 Mountain Road, Linthicum, Maryland 21090. Margaret Graves is the wife of plaintiff Thurman L. Graves and Sandra Pletka is their daughter. Plaintiffs Margaret Graves, Thurman L. Graves and Sandra Pletka are collectively referred to herein as "the Graves Plaintiffs."

44. Thurman Graves purchased a Certificate of Deposit issued by Old Court (No. 02-700006-9) and redeemed said Certificate prior to its date of maturity on May 11, 1985. The Graves Plaintiffs jointly purchased a Certificate of Deposit

issued by Old Court (No. 02-702125-0) and redeemed said Certificate prior to its date of maturity on or about May 11, 1985.

45. The Graves Plaintiffs redeemed their respective Certificates of Deposit from Old Court on May 11, 1985 prior to the date of maturity of such Certificates because of the public announcement that Old Court was in serious financial difficulties and because of facts or rumors, which turned out to be true, that Old Court had been mismanaged and depleted by its owners and would collapse. At that time there was a general panic among depositors in savings and loan institutions which were insured by MSSIC based in part on knowledge that Ohio savings and loans with similar insurance were unable to continue normal operations and on other information generally circulated that MSSIC would be unable to repay loans at member banks during this period and the foreseeable future.

46. By redeeming their Certificates of Deposit before the maturity dates, the Graves Plaintiffs forfeited as a penalty all interest accrued on these certificates, which amounted to approximately $23,000.

47. The Graves Plaintiffs purchased their Certificates of Deposit in much the same way and in reliance upon the same information as did plaintiff Kent Butcher.

48. Rio Grande Savings & Loan Association ("Rio Grande") is a Colorado Chartered Savings and Loan Association having a principal place of business at 901 First Avenue, Monte Vista, Colorado.

49. On March 4, 1985 Rio Grande purchased from Old Court through an investment broker, First Investment Securities, Inc., of Little Rock, Arkansas, an Old Court Certificate of Deposit No. 04-855726-8 in the amount of $100,000. It matures on March 5, 1990. Rio Grande received dividend payments on the Certificate of Deposit on April 8, May 6 and June 10, 1985, but has received no dividend payments since that time, and has been unable to obtain the principal amount of the Certificate.

50. Rio Grande became aware of the sale of Old Court Certificates of Deposit through First Investment Securities, Inc. which assured Rio Grande, on behalf of Old Court, of the safety of investments made in Old Court and represented, *inter alia*,

that the Certificates of Deposit were fully insured by the Federal Savings and Loan Insurance Corporation.

51. Enterprise Equipment Co., Inc. is a Massachusetts corporation having its principal place of business at 857 Washington Street, East Weymouth, Massachusetts 02189.

52. On October 1, 1984, Enterprise Equipment Co. purchased an Old Court Certificate of Deposit No. 04-702758-8 in the amount of $50,000. It matured one year from the date of purchase with an option to renew for an additional period of time.

53. Plaintiff Gertrude Durso is an individual citizen of the State of Pennsylvania who resides at William Penn House, Apartment 2808, 1919 Chestnut Street, Philadelphia, Pennsylvania 19103. On February 15, 1985 she purchased an Old Court Certificate of Deposit No. 04-705568-9 in the amount of $10,000. It matured one year from the date of purchase.

54. Carmen R. Goldings is an individual citizen of the State of Massachusetts who resides at 65 Sterling Street, West Newton, Massachusetts 02165. Sarah M. Goldings is an individual citizen of the State of Massachusetts who resides at 1284 Beacon Street, Brookline, Massachusetts 02146. On October 12, 1984 they purchased in their capacity as trustees for the Herbert J. Goldings, M.D. and Carmen R. Goldings, M.D., P.C. Pension Plan an Old Court Certificate of Deposit No. 04-855334-4 in the amount of $100,000. It had a maturity date one year from the date of purchase.

55. Herbert J. Goldings, M.D. and Ethan D. Goldings are individual citizens of the State of Massachusetts who reside at 65 Sterling Street, West Newton, Massachusetts 02165. On April 23, 1985 they purchased Old Court Certificate of Deposit No. 04-303980-5 in the amount of $6,300. That Certificate of Deposit matured six months from the date of its purchase, with an option to renew for an additional period of time.

56. Clelia S. Goldings is an individual citizen of the State of Massachusetts who resides at 65 Sterling Street, West Newton, Massachusetts 02165. On December 18, 1984 she and Herbert J. Goldings purchased Old Court Certificate of Deposit No. 04-704122-3 in the amount of $13,400 and on February 26, 1985

purchased 06-700841-6 in the amount of $4,000. Each of the foregoing Certificates of Deposit had a maturity date of one year from the date of purchase.

57. Doris Konig is an individual citizen of the State of New York who resides at 315 West 86th Street, Suite 15B, New York, New York 10024. She purchased certificates of deposit from Old Court as identified below:

Certificate No.	Date of Purchase	Amount
04-703412-8	11/13/84	$3,000.00
04-703505-6	11/19/84	1,500.00
06-700460-5	12/21/84	8,986.76
04-706217-2	3/21/85	4,569.16

58. All of the foregoing certificates by their terms matured one year from the date of purchase with an option to renew for an additional period of time.

59. Mitchell W. Landy is an individual citizen of the state of Pennsylvania who resides at 3901 Conshohocken Avenue, Apartment 220, Philadelphia, Pennsylvania 19131.

60. Plaintiffs Enterprise Equipment Co., Inc., Gertrude Durso, Carmen R. Goldings, Sarah M. Goldings, Herbert J. Goldings, Ethan D. Goldings, Clelia S. Goldings, Doris Konig, and Mitchell W. Landy learned of the sale of Old Court Certificates of Deposit from advertisements in one or more of the following newspapers, *The Philadelphia Inquire, The Wall Street Journal,* and *The New York Times,* one or more of which are regularly circulated in the several districts in which they live. In addition, they received in response to their inquiries through the United States Mail written material from Old Court and MSSIC which described the certificates as fully insured and risk free and some of them made interstate telephone calls and engaged in telephone conversations with representatives of Old Court, MSSIC and/or the Division of Savings and Loan of the State of Maryland, all of whom assured them of the safety of their investments in Old Court Certificates of Deposit.

61. None of those defendants have had access to the interest or principal amounts of their Certificates of Deposit.

Certificates of Deposit maturing prior to November 8, 1985, were renewed into successive thirty-day Certificates of Deposit accruing interest at 5½ percent, and since on or about November 8, 1985, no further interest has been accruing on any of the Certificates of Deposit, whether or not they have matured.

62. Old Court held a toll-free "800" telephone number for use by persons in states other than Maryland. Plaintiffs allege on information and belief that this number was used either exclusively or primarily in connection with the sale of Old Court Certificates of Deposit to citizens and residents of states other than Maryland.

63. Defendant Old Court Savings and Loan, Inc. ("Old Court") is a Maryland Corporation chartered as a Maryland Savings and Loan Association in 1960. From that date until May 13, 1985 it held itself out to the public as a safe and well managed savings and loan institution. Its principal place of business was 16 South Calvert St., Baltimore, Maryland.

64. On in November 8, 1985 Old Court was put in receivership in the Circuit Court for Baltimore City, Maryland. Defendant Maryland Deposit Insurance Fund Corporation ("MDIF") is the receiver of Old Court.

65. From approximately June 1, 1985 to November 8, 1985, Old Court was in conservatorship in the Circuit Court for Baltimore City, Maryland. The conservator was initially MSSIC, but MDIF was substituted shortly thereafter as its successor in interest and assumed all the assets and liabilities of MSSIC.

66. Defendant LCP Corporation ("LCP Corp.") is a Maryland corporation with its principal place of business in Baltimore, Maryland. Since September, 1982 LCP Corp. has owned all of the issued and outstanding stock of Old Court.

67. All of the issued and outstanding stock of LCP Corp. is owned by defendants Jeffrey A. Levitt (32½%), Allan H. Pearlstein (32½%), Jerome Cardin (18%) and Light Street Partnership (17%).

68. Light Street Partnership ("Light Street") is a Maryland general partnership owned equally by defendants Allan H. Pearlstein and Karol Levitt (the wife of defendant Jeffrey A. Levitt).

69. Defendant Jeffrey A. Levitt was President and Chief Operating Officer as well as a director of Old Court from the date of its acquisition by LCP Corp. (in which he was a shareholder) until May 13, 1985. During this time period, he was also an officer, director, shareholder, partner or joint venturer in various Old Court subsidiaries and affiliates, some of which are identified in paragraphs 88 and 96(f) of this Complaint.

70. Defendant Jeffrey A. Levitt is a member of the Bar of the State of Maryland, although at some time prior to his acquisition of his ownership interest in Old Court his license to practice law was suspended by the disciplinary authorities of the Bar of the State of Maryland.

71. From sometime in 1975 until September, 1982 when LCP Corp. purchased the stock of Old Court, Defendant Jeffrey A. Levitt was a director and general counsel of First Progressive Savings and Loan, Inc. ("First Progressive") a Maryland mutual savings and loan association. Plaintiffs allege on information and belief that he used money belonging to First Progressive to buy his interest in Old Court.

72. For the period September, 1982 through May 13, 1985, the individual defendants named below were designated and served as directors and/or officers of Old Court ("Old Court Directors").

Name	Position
Jeffrey A. Levitt	Director and President
Allen Feinberg	Director and Secretary
David Uhlfelder	Director
Robert D. Pearlstein	Director and Treasurer
Samuel Shoubin	Director
Dennis E. Guidice	Director and Executive Vice-President

73. Defendant Karol Levitt is the wife of defendant Jeffrey A. Levitt. In addition to her interests in LCP Corp. and Light Street, she was an officer, director, partner, joint venturer, or shareholder of various Old Court subsidiaries and affiliates some

of which are identified in later paragraphs of this Complaint. She also had ownership interests in various entities which she and Jeffrey A. Levitt used to divert from Old Court funds for their own personal use and those of other members of their family and the other defendants including, in particular, defendants Allan H. Pearlstein and Rosemary Pearlstein. She also received funds and fees directly from Old Court for which she performed no services.

74. When defendant Jeffrey Levitt resigned as a director of First Progressive (September, 1982), defendant Karol Levitt was appointed a director and secretary of First Progressive.

75. Defendant Allan H. Pearlstein was as previously alleged a controlling shareholder of LCP Corp. directly and through Light Street. Although not formally titled an officer or director of Old Court, defendant Allan H. Pearlstein, as well as defendants Jerome Cardin and Karol Levitt, acted as such by, *inter alia*, appointing as directors their nominees defendants Robert D. Pearlstein (Allan H. Pearlstein's son) and defendant Samuel Shoubin (Jerome Cardin's father-in-law); controlling Old Court by virtue of their ownership interest in LCP Corp. (Allan H. Pearlstein and Jerome Cardin) and Light Street (Allan H. Pearlstein and Karol Levitt); and otherwise participating and directing the affairs of Old Court through various joint ventures, partnerships, corporations, subsidiaries and other affiliates some of which are identified elsewhere in this Complaint, and with respect to Cardin through his law firm, Cardin and Cardin, P.A. Defendant Jerome Cardin, or a representative of Cardin and Cardin, P.A., attended all Old Court Board of Director meetings.

76. Defendant Rosemary Pearlstein is Allan H. Pearlstein's wife and together with him participated in various acts related to his self-dealing with Old Court through various joint ventures, partnerships, corporations, subsidiaries and other affiliates. Rosemary Pearlstein also received monies in the form of excessive fees or other payments unrelated to or inconsistent with any services she performed for Old Court.

77. Defendants Jeffrey Levitt and Allan Pearlstein controlled and operated First Progressive prior to the purchase of

Old Court by LCP Corp. and directly or indirectly thereafter until it was merged into Old Court on November 1, 1984, at the urging of the MSSIC defendants. Defendant Allan H. Pearlstein was the President of First Progressive.

78. Defendant Jerome Cardin is a member of the Bar of the State of Maryland. He was one of the original directors of Old Court when it was incorporated in 1960. From 1960 through September, 1982 he was co-general manager of Old Court, and from 1960 through May 13, 1985 he, individually or through his law firm, Cardin and Cardin, P.A. (and its predecessor Cardin and Weinstein), was general counsel for Old Court, its subsidiaries and many of its affiliates.

79. Cardin and Cardin, P.A. is a Maryland corporation engaged in the business of operating a law firm. Its principal place of business is located at 6615 Reisterstown Road, Baltimore, Maryland 21215. As stated in paragraph 46 above it or its predecessor, Cardin and Weinstein, were general counsel for Old Court, its subsidiaries and many of its affiliates from its inception through May 13, 1985. Plaintiffs allege on information and belief that Cardin and Cardin, P.A. received excessive and improper fees from Old Court

80. Prior to September, 1982 Jerome Cardin and members of his family, including a former judge of the Circuit Court for the City of Baltimore, were the sole owners of Old Court. They collectively sold the controlling interest in Old Court to LCP Corp.

81. Defendant Glass and Associates, P.A. is a Maryland corporation engaged in the business of operating a certified public accounting firm. Its principal place of business is located at 2 Hopkins Plaza, 714 Mercantile Bank & Trust Building, Baltimore, Maryland 21201. The firm was engaged by Old Court to perform accounting and auditing functions after September, 1982 and plaintiffs allege that they did perform such services until sometime in 1984 or 1985. Plaintiffs allege on information and belief that Glass and Associates reviewed the books and records of Old Court periodically and assisted in the preparation, either directly or indirectly, of unaudited statements of Old

Court distributed to prospective purchasers of Old Court Certificates of Deposit, and that it prepared an audited year end statement for Old Court for 1983 and possibly 1984.

82. Defendants Jeffrey A. Levitt, Allan H. Pearlstein, Jerome Cardin, Karol Levitt, the other officers and directors of Old Court, Light Street and LCP Corp. were controlling persons of Old Court within the meaning of Section 20 of the Exchange Act, 15 U.S.C. §78t(a). They will be referred to collectively along with Old Court, Rosemary Pearlstein, Cardin & Cardin and Glass & Associates as the "Old Court Defendants."

83. Defendant Maryland Savings Share Insurance Corporation ("MSSIC") is a Maryland Corporation chartered in 1962 in order to protect depositors and investors with accounts in Maryland savings and loan institutions which were not federally insured. The institutions which MSSIC purported to insure, of which there were approximately 100 during the period 1982 through May, 1985 (one of which was Old Court), were members of MSSIC and together controlled it by their right to elect eight of the eleven members of the Board of Directors (the other three were appointed by the Governor of Maryland). MSSIC stated orally and in writing in response to inquiries and to the general public on a continuing basis that it insured up to $100,000.00 each account of any kind on deposit with any member. First Progressive was a MSSIC member.

84. The individual defendants identified below, (along with MSSIC, collectively referred to as the "MSSIC Defendants"), constituted the Board of Directors and executive officers of MSSIC, at times relevant to this action. Many of these defendants had been officers or directors of Maryland Savings and Loan institutions.

Charles C. Hogg, II – President and Chief Operating Officer
Paul B. Trice, Jr. – Senior Vice President
George W. H. Pierson – Chairman of the Board of Directors
Jerome F. Dolivka – Vice Chairman of the Board of Directors

Frances F. Anderson – Director and Treasurer
Michael J. Dietz – Director and Secretary
Leonard Bass – Director
John C. Donohue, Sr. – Director
Henry R. Elsnic – Director
John D. Faulkner, Jr. – Director
James D. Laudeman, – Director
Terry L. Neifeld – Director

85. The State of Maryland Deposit Insurance Fund Corporation ("MDIF") is a Maryland Corporation created by the Maryland General Assembly on or about May 18, 1985 in emergency legislation. (Chapter 6 of the Special Session of 1985.) Its principal place of business is located at 114 E. Lexington Street, Baltimore, Maryland 21202. Effective June 1, 1985, it became the successor in interest to MSSIC, having assumed all of MSSIC's assets and liabilities, and agreed to pay up to $100,000 per account frozen at Old Court. MDIF was the conservator for Old Court until November 8, 1985 at which time it became the receiver.

86. Venable, Baetjer & Howard ("VB&H") is a Partnership engaged in the practice of law which has its principal place of business in Baltimore, Maryland. From 1974 until late 1985, VB&H served as general counsel to MSSIC. During that time period, a lawyer from VB&H attended virtually every meeting of the board of directors of MSSIC.

87. Defendants Jeffrey A. Levitt, Allan H. Pearlstein, Jerome Cardin and Karol Levitt purchased Old Court through LCP Corp. with the purpose and intent of using it to raise large amounts of capital to dispose of and invest for their own personal benefit, without regard to applicable law and banking regulations designed to protect owners of investment certificates and depositors in all accounts at Old Court; and did so, individually and collectively among themselves and in concert with others, including the other Old Court Defendants, Glass & Associates, Cardin & Cardin, the MSSIC defendants and various officials of the Division of Savings and Loans of the Maryland Department

of Licensing and other Governmental Entities identified in paragraph 69 of the Complaint.

88. In order to implement the scheme to divert funds belonging to Old Court into personal or business enterprises, defendants Jeffrey Levitt, Allan Pearlstein, Karol Levitt, with the assistance of the other Old Court directors, used existing subsidiaries and affiliates of Old Court and created others with interlocking officers and directors including but not limited to: Old Court Joint Ventures, Inc., Old Court Investment Company, Inc., Monumental City Service Corporation; The Insurance Group, Inc. (formerly "Old Court Insurance Group, Inc."), Magill Herman, Inc., Intermarket, Inc., Meridian Mortgage Investment Corp., Bankers' Realty, Inc., and Bankers' Appraisal, Inc.

89. Defendants Feinberg and Guidice (Old Court directors and officers) participated in the above scheme as did officers and directors of some of the above entities, and received excessive and improper fees and payments from Old Court or one or more of the above subsidiaries and affiliates of Old Court or others related to or affiliated with Old Court, Jeffrey Levitt, Karol Levitt, and Allan Pearlstein.

90. One of the means by which the new owners of Old Court attempted to generate the cash for their investments, was to cause Old Court, shortly after its acquisition by LCP, to offer for sale and sell Certificates of Deposit at higher rates of interest than those being offered by competitive financial institutions.

91. Since the sale of Certificates of Deposit locally would not generate sufficient funds to finance the Old Court defendants' objectives, the Old Court defendants attempted to sell great numbers of such Certificates to persons or entities outside Maryland who would not ordinarily do business with Old Court and would not in all likelihood know of Old Court otherwise, in addition to promoting sales of such Certificates within Maryland.

92. In connection with their efforts to attract out of state purchases of Old Court Certificates of Deposit, the Old Court Defendants instituted a massive national advertising campaign which utilized newspapers with national circulation as well as

newspapers in other regional markets including, *inter alia*, the Wall Street Journal, the New York Times, the Philadelphia Inquirer, the Los Angeles Times, the Washington Post and the Chicago Tribune, in addition to the local Baltimore papers.

93. In addition, the Old Court Defendants initiated a campaign to utilize brokers and investment bankers to market Certificates of Deposit, and succeeding in selling Certificates of Deposit through such brokers and investment bankers, including, but not limited to, First Investment Securities, Inc., a Little Rock, Arkansas brokerage firm.

94. In connection with their efforts to attract out of state buyers of Certificates of Deposit, Old Court utilized a toll free "800" number, prepared employees with information to respond favorably to out of state inquiries as to the safety and risk-free nature of Old Court Certificates of Deposit, arranged with the MSSIC defendants as well as personnel at Governmental Entities (defined in Paragraph 82 of this Complaint) to answer inquiries about Old Court positively and together with MSSIC prepared and distributed numerous letters, brochures and other materials emphasizing the risk free nature of all investments and deposits at Old Court based upon the representation that they were fully insured up to $100,000.

95. The advertisements placed by Old Court in various newspapers and the written material distributed directly to potential purchasers and the public were intended to and did in fact create the impression that the Old Court's Certificates of Deposit were "safe" investments, insured by a governmental agency in much the same way as were Certificates of Deposit from banks and savings and loan institutions insured by the Federal Deposit Insurance Corporation ("FDIC") and Federal Savings and Loan Insurance Corporation ("FSLIC".)

96. In connection with the Defendants' campaign to induce the investing public to purchase Old Court Certificates of Deposit, Old Court:

(a) Stated falsely that it had an "advantage" over other financial institutions in that it could pay a higher yield on its Certificates of Deposit than comparable institutions without

risk of loss to purchasers of such investments while continuing to operate in accordance with sound banking practices, because Old Court was operated by experienced, knowledgeable and aggressive management;

(b) Utilized in its advertisements in newspapers, on stationary and elsewhere a seal similar to that of the State of Maryland adopted by MSSIC intending thereby and through direct statements to prospective purchasers of Certificates of Deposit to mislead such purchasers into believing that their investments in Old Court were safely insured up to $100,000 per account by the State of Maryland or a Maryland governmental agency;

(c) Issued in response to inquiries from potential customers, especially prospective purchasers of Certificates of Deposit, financial statements purporting to set forth a true and accurate picture of the financial condition of Old Court, knowing such statements were incorrect;

(d) Distributed in response to inquiries about the safety of Old Court Certificates of Deposit from prospective purchasers, including plaintiffs Seymour Zuckerman, George R. Lyon and Francine Tafflin various materials in the form of brochures and letters, some of which were prepared by MSSIC and all of which contained false and misleading information; including, but not limited to: a brochure entitled "Old Court Savings & Loan, Inc. Statement of Financial Condition"; a brochure entitled "We Have the Answers"; and monthly letters on MSSIC stationary entitled "An Open Letter to a Potential MSSIC Saver" (all of which contain false and misleading information) which were intended to and had the effect of inducing investors to believe that the Old Court Certificates of Deposit were fully and safely insured by a governmental agency;

(e) Represented that its operations were at all times in compliance with the rules and regulations of the applicable regulatory agencies of Maryland, while knowing that it was

a notorious violator of MSSIC regulations as well as state statutory law and regulations;

(f) Failed to disclose to potential purchasers of Certificates of Deposit that Old Court was lending significant sums of money to business enterprises belonging to or controlled by defendants Jeffrey A. Levitt and Allan H. Pearlstein and/or their relatives, and associates, or other Old Court defendants, including, but not limited to Levitt-Pearlstein Investment Foundation; Levitt-Pearlstein Management Co.; Charles Street Title Co.; Karol Springs Partnership I and II, Pearl Miami Partnerships; Bay Breeze Limited Partnership; and Ostot Enterprises, Inc.;

(g) Failed to disclose that certain of the Old Court Defendants attempted to obtain from Maryland governmental officials preferential treatment for various business enterprises belonging to or controlled by Jeffrey A. Levitt, Allan H. Pearlstein and their relatives and associates by lending money belonging to Old Court to such persons with the understanding that such "loans" not be repaid or could be repaid on preferential terms;

(h) Failed to disclose material facts as to the creation and use of numerous corporations, partnerships and joint ventures including, *inter alia,* those identified in paragraphs 75 (f) and 68 of the Complaint, with complex and interlocking relationships among them and with Old Court which were controlled by one or more of the defendants Jeffrey A. Levitt, Allan H. Pearlstein, Jerome Cardin, Karol Levitt, Rosemary Pearlstein, Allan Feinberg, Dennis E. Guidice, Samuel Shoubin, Robert D. Pearlstein and others to act as conduits to enable some or all of the individual Old Court defendants, relatives, friends and associated unnamed parties in obtaining money belonging to Old Court for their own personal gain.

(i) Failed to disclose that First Progressive was in effect operated and controlled by defendants Jeffrey A. Levitt and Allan J. Pearlstein (even prior to its merger with

Old Court) and that First Progressive was in serious financial difficulties because of, *inter alia,* mismanagement and misappropriation of funds by defendants Jeffrey A. Levitt and/or Allan H. Pearlstein or other related individuals.

97. All of the Old Court defendants, as officers, directors and shareholders of Old Court or otherwise in their respective capacities, knew that the information prepared, published and circulated to potential and current investors as well as to the public at-large was false and misleading and failed to state facts necessary to avoid the misleading nature of such representations and that such material misleading information was intended to induce investors to rely upon it in connection with their purchases of Old Court Certificates of Deposit.

98. The MSSIC defendants knew of Old Court's aforementioned acts, misrepresentations and omissions to disclose material information regarding its operations generally and in connection with the offer and sale of Certificates of Deposit by Old Court, and explicitly and implicitly aided, abetted and consented to the unlawful practices of the Old Court defendants and the material misrepresentations and failures to disclose information necessary to avoid the misleading nature of these and other representations in connection with the sale of Old Court Certificates of Deposit.

99. The MSSIC defendants alone and in concert with the Old Court defendants, other Maryland savings and loan institutions, officials of Maryland's Department of Licensing, Saving and Loan Division, and other unnamed parties artificially inflated the attractiveness of Old Court's Certificates of Deposit (and those of other Maryland savings and loan institutions) in order to induce investors to purchase Old Court Certificates of Deposit as well similar certificates of deposit sold by other member savings and loan institutions in the following ways:

(a) Prepared, published, distributed and made available for distribution by member savings and loan association a brochure entitled "We Have the Answers" creating the impression it was a Maryland state agency responsible

for the regulation of over one hundred savings and loan institutions in Maryland, and that, in fact, it regulated such savings and loans to insure the safety of deposits and investments in them;

(b) Prepared, published, distributed and made available for distribution by member savings and loan institutions, on a regular basis, letters entitled "An Open Letter to a Potential MSSIC Saver" which were given to prospective purchasers of Certificates of Deposit, intending to and in effect creating the impression that it regulated all of its 101 members savings and loan institutions in essentially the same manner as the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation did for the banks and savings and loans insured by them;

(c) Responded to telephone and written inquiries by prospective purchasers of Certificates of Deposit by assuring them of the safety of their investment in member savings and loan associations;

(d) Permitted member savings and loan associations to advertise the sale of Certificates of Deposit in national and regional newspapers including the Philadelphia Inquirer, the Wall Street Journal, the New York Times, the Los Angeles Times, the Washington Post, and the Baltimore Evening Sun using a seal similar to that of the State of Maryland and otherwise creating by words and pictures the image that such institutions were operated by and insured by governmental agencies of or the State of Maryland itself;

(e) Pursued an explicit policy of concealing adverse information concerning its member savings and loan institutions and, in particular, Old Court, in order to prevent its publication by newspapers and electronic media; and

(f) Opposed legislation introduced in the Maryland legislature that would have required MSSIC to expressly state, as was true, that it was not backed by the full faith and credit of the State of Maryland.

100. Commencing at some time after the purchase of Old Court by LCP Corp. and continuing virtually until the collapse of Old Court, during which time plaintiffs and members of the class were purchasing and renewing Old Court Certificates of Deposit, the MSSIC defendants, contrary to their representations to plaintiffs and members of the class, knew that Old Court Certificates of Deposit were not "safe" investments because, *inter alia,*

(a) Old Court was being systematically looted by several of the Old Court Defendants in that they were diverting substantial funds of Old Court for their own use;

(b) Old Court was a "habitual violator" of MSSIC's rules and regulations;

(c) Old Court was systematically paying exorbitant management, consulting, and similar fees to several of the Old Court defendants and other associated entities or persons;

(d) Old Court was during the same period systematically allowing the Old Court defendants and members of their families to overdraw in huge amounts on NOW accounts at Old Court, as well as making insider loans in amounts prohibited by MSSIC and state regulations;

(e) Old Court was being used by the Old Court defendants as a captive savings and loan to generate large amounts of cash to be used to finance large real estate and other projects in which they and related persons and business entities had interests. These large real estate investments were individually illegal, improper and imprudent and taken together absorbed an excessive amount of Old Court's total capital;

(f) The proportion of assets of Old Court utilized in making commercial construction and unimproved land loans was 69.83% on March 31, 1985. This effectively placed Old Court in an extremely risky financial posture.

Under MSSIC rules and regulations, the maximum proportion of assets to be so used was 40%. Even before March 31, 1985, it exceeded the MSSIC guidelines and prudent banking standards;

(g) The extremely high proportion of Old Court assets devoted to such loans was even riskier than readily apparent since, as certain of the Old Court defendants knew and in fact planned, a large number of such loans had been made to entities affiliated in some manner with one or more of the Old Court defendants.

(h) Many of the Old Court loans described in paragraph (f) above as well as many of the loans generally made by Old Court, particularly those made to Old Court defendants or related entities, were made with inadequate documentation and collateral or even completely without documentation and/or collateral.

(i) Other deficient, risky, and fraudulent lending practices included refinancing of delinquent loans with further loans, and issuance of mortgage loans in amounts larger than 80% of the sale price of the underlying realty;

(j) On November 1, 1984, at the urging of MSSIC, First Progressive was merged into Old Court, despite the fact that the MSSIC defendants knew that First Progressive was operating at a substantial loss and was operating in violation of MSSIC regulations as well as those of the Division of Savings and Loans and that Old Court itself was, as alleged previously in this complaint, operating in violation of these same rules and regulations. The MSSIC defendants were also aware that First Progressive was at that time and for sometime prior thereto controlled and operated by defendants Jeffrey A. Levitt and Allan H. Pearlstein and that the poor financial condition and mismanagement of First Progressive was at least in part a result of unlawful acts of defendants Jeffrey A. Levitt, Allan H. Pearlstein and Karol Levitt.

101. In March, 1985, at the same time that the aforementioned brochures and letters were being circulated to prospective investors, MSSIC sent a letter to Jeffrey Levitt, Old Court's President, specifying in detail over fifteen separate and serious violations of MSSIC rules and regulations by Old Court.

102. The MSSIC defendants concealed from and deliberately misrepresented to the investing public the nature of the "insurance" offered by MSSIC in, *inter alia,* the following ways:

(a) MSSIC asserted that the "insurance" consisted of an undertaking by MSSIC to back up each of the accounts in all of its 101 member savings and loan institutions, but in fact, the MSSIC defendants knew that such an undertaking would be impossible in the event of a "run" on savings and loans like that experienced in several states in the recent past because it had insufficient liquid assets to do. A significant portion of its assets were securities from member institutions which could not be converted to cash readily; or

(b) MSSIC asserted, contrary to fact (according to MDIF and MSSIC regulations), that in the event that an insured member was unable to pay any depositor with any type account including Certificates of Deposit, upon demand and in accordance with the terms under which such deposits were made or such certificates were sold, MSSIC would promptly assume such obligation and honor it under the same terms and conditions agreed to between the member savings and loan institutions and depositors or owners of certificates of deposit. This assertion was made to all purchasers of Certificates of Deposit, including the named plaintiffs Francine Tafflin, Seymour Zuckerman and George R. Lyon in various ways including:

(i) A statement as to what MSSIC did in a situation in 1964 involving a member institution in financial trouble;

(ii) Describing MSSIC insurance as the equivalent of FSLIC and FDIC insurance; and

(iii) Representing itself as a governmental agency.

(c) MSSIC misrepresented the number of problems which it had encountered since its formation by citing only one such situation, when in fact there were other problems including those at First Progressive in which they were deeply involved.

(d) MSSIC never supervised or regulated its members in the manner it was obligated to do by its charter, by-laws and regulations.

103. VB&H has since at least as early as 1974 represented various saving and loan associations which were members of MSSIC, or the owners, directors, officers or agents of such associations including, but not limited to, Cardin, Jeffrey Levitt, Old Court, and Allan Pearlstein, while at the same time serving as counsel to MSSIC. In addition, VB&H has served as counsel to several partnerships or other business entities in which one or more of the above named individuals were involved, and one or more partners of VB&H participated as a principal in one or more businesses in which certain Old Court defendants were also principals.

104. VB&H was at all times aware that its legal services for MSSIC would cause MSSIC to take actions which would be relied upon by persons purchasing certificates of deposit from Old Court, First Progressive and other member savings and loan associations. In representing MSSIC, VB&H owed a duty to depositors and purchasers of certificates of deposit from MSSIC member savings and loan associations, which duty it failed to perform because of conflicts of interest arising from its representation of Old Court; various Old Court defendants and other firm clients associated with other members of MSSIC.

105. As a result of its representation of the above referenced parties, VB&H was not properly carrying out its duties as independent counsel to MSSIC on matters in which MSSIC's actions might infringe upon the interests of their other clients.

106. At least in part because of this conflict of interest, VB&H participated with and aided and abetted the Old Court Defendants and the MSSIC Defendants in carrying out the aforementioned scheme and frauds. In advising MSSIC's Board

of Directors, whose members included representatives of the present or former clients, VB&H aided the MSSIC Defendants and the Old Court Defendants in concealing the problems which existed at Old Court and MSSIC. Among the various actions which were taken knowingly and/or recklessly by VB&H were:

(a) Advising MSSIC that it could advertise that accounts of its member institutions were insured up to $100,000 per account, regardless of the number of accounts opened by a particular investor, whereas MSSIC was not authorized to do so, nor did it have adequate funds to insure repayment of investors on that basis;

(b) Advising MSSIC to attempt to defeat legislation which would require MSSIC members to disclose that MSSIC was not a state agency;

(c) Advising MSSIC to ignore flagrant violations of its own regulations and those of the Division of Savings & Loan of the Maryland Department of Licensing by members and in particular Old Court, and its predecessor First Progressive;

(d) Failing to advise MSSIC of the numerous violations by the Old Court Defendants of state and federal securities laws enumerated herein; and

(e) Knowing that MSSIC's own conduct constituted a violation of state and federal securities laws and that it had an affirmative duty to cease such conduct, but failing to advise MSSIC of those violations or of its duty.

107. VB&H received fees for representing some or all of the Old Court Defendants in an amount in excess of $295,000.

108. Three Maryland governmental agencies charged with regulating savings and loan institutions in Maryland, the Department of Licensing and Inspection, the Board of Savings and Loan Association Commissioners and the Division of Savings and Loan Associations ("Governmental Entities") acting alone, in concert with each other and in concert with MSSIC failed to regulate Maryland savings and loan institutions and actively hid

from the investing public and plaintiffs the adverse information they knew about the financial condition, violation of MSSIC rules and regulations as well as those of the responsible governmental entities, the unlawful self dealing and other improper practices of Old Court and other savings and loan institutions. One flagrant example of this lack of compliance with laws and regulations was the failure to find and disclose year end audited statements for Old Court fiscal years 1983 and 1984.

109. A number of individual officials with responsibility for the operations of these Governmental Entities had long standing relations with the savings and loan industry, and with the MSSIC defendants (who also had past ties with member savings and loans) and intentionally concealed information adverse to various savings and loan institutions for fear the disclosure of adverse information would damage the owners of such institutions, especially Old Court.

110. The Governmental Entities and MSSIC were convinced that revelations of any adverse information regarding the savings and loan industry could result in a loss of public confidence in the savings and loan system, a decrease in deposits and investments and perhaps even cause a "run", resulting in criticism or liquidation of MSSIC and the governmental entities. Contrary to their duties and public representations, the Governmental Entities, MSSIC, and the MSSIC Defendants adopted explicit policies of hiding their knowledge of the poor financial condition of several savings and loan institutions and of their serious violation of its regulations and sound banking practices.

111. As was inevitable and as known by the defendants to be inevitable, a run did in fact take place on Old Court and Old Court was unable to meet the demands for withdrawals by its customers.

112. On May 13, 1985, Old Court was placed into conservatorship in the Circuit Court for Baltimore City, Maryland (hereinafter "Conservatorship Proceeding"). MSSIC was appointed the Conservator.

113. On or about June 1, 1985, the Maryland General Assembly established the Maryland Deposit Insurance Fund

Corporation ("MDIF"), as the successor in interest of MSSIC, and MDIF was substituted as the Conservator for Old Court. MDIF assumed all of the assets and all of the liabilities of MSSIC, including all of its insurance liabilities.

114. On or about May 13, 1985, the Circuit Court for Baltimore City, by order in the Conservatorship Proceeding, *inter alia*, limited withdrawals from all accounts for all deposits at Old Court (including Certificates of Deposit) made prior to May 13, 1985 to no more than $1,000 for each consecutive thirty day period.

115. On or about June 7, 1985, the Circuit Court for Baltimore City, by order in the Conservatorship Proceedings, prohibited all withdrawals from all accounts (including Certificates of Deposit) at Old Court of funds deposited prior to May 13, 1985 for a period of ninety days subsequent to the date of said Order (hereinafter "June 7, 1985 Order").

116. The June 7, 1985 Order, *inter alia*, allowed Certificates of Deposit to accrue interest at the rate contracted for when opened until the date of maturity of such certificates at which time (if within the ninety-day period of the June 7, 1985 Order) the Investment Certificate would be rolled over automatically into successive thirty-day Certificates of Deposit accruing interest at 5½ per cent.

117. On or about June 27, 1985, the Circuit Court of Baltimore County by order in the Conservatorship Proceeding continued to preclude all withdrawals of funds deposited in all accounts (including Certificates of Deposit) at Old Court prior to May 12, 1985, subject to an exception that funds could be withdrawn for the purpose of making monthly or other periodic payments on any debt owed to Old Court.

118. Subsequent to the June 27 Order, and until October 28, 1985 further orders or actions in the Conservatorship Proceeding prohibited withdrawals of deposits made prior to May 13, 1985 which again included Certificates of Deposit. On October 28, 1985 by Order of the Court in the Conservatorship Proceedings certain hardship exemptions were promulgated which allowed withdrawal from certain accounts on a very limited basis. None of the named plaintiffs have obtained any

funds on this basis, and plaintiffs allege on information and belief that such a strict construction of the "exemptions" has made it virtually meaningless.

119. On or about November 8, 1985, the Circuit Court for Baltimore City converted the Old Court Conservatorship Proceeding into a Receivership Proceeding. MDIF was appointed the Receiver.

120. Upon conversion of the Conservatorship Proceeding into a Receivership Proceeding, the Circuit Court for Baltimore City prohibited (a) the accrual of all subsequent interest due on Certificates of Deposit and (b) required that Certificates of Deposit which matured as of that date or subsequent thereto be rolled over into accounts upon which no interest was payable.

121. On January 3, 1986, defendant Jeffrey A. Levitt was indicted by a state grand jury on criminal charges of embezzling and misappropriating $14.6 million from Old Court and First Progressive. The indictment contains 12 felony embezzlement counts and 13 misdemeanor charges of misappropriation by a fiduciary. One count of the indictment alleges that Levitt got the money to buy his stake in Old Court by stealing from First Progressive.

122. The Attorney General for the State of Maryland has announced that he intends to seek indictments about other individuals involved in the Old Court/First Progressive fraud in the near future.

123. A joint federal and state investigation into possible criminal acts by persons involved with Old Court has been taking place for the last several months.

124. As a result of the collapse of Old Court and its failure and/or inability to pay to plaintiffs the amounts invested by them in Old Court Certificates of Deposit, the plaintiffs have been damaged and continue to be damaged despite the fact that at some indeterminate time in the future MDIF and/or some other entity may pay to them some portion or all of the principal the invested in Old Court.

125. As a result of defendants' unlawful actions as alleged herein, the named plaintiffs and members of the class have been injured and will continue to be injured at an accelerated rate in

that as of November 8, 1985 no interest whatsoever is being accrued on Old Court Certificates of Deposit, and that since May 13, 1985 interest on Old Court Certificates of Deposit which matured as of that date but prior to November 8, 1985 was being accrued at the rate of 5½%, rather than the interest rates which Old Court was obligated to pay on such Certificates of Deposit pursuant to the terms and conditions of their sale.

126. As a result of the foregoing alleged and improper acts by defendants, numerous persons who had purchased Old Court Certificates of Deposit, such as the Graves Plaintiffs, redeemed their Certificates prior to their dates of maturity, thereby forfeiting all accrued interest. They were effectively required to do so by the defendants in that the defendants' conduct, as alleged in the Complaint, had fraudulently induced them to purchase Certificates of Deposit and directly led to the collapse of Old Court, the onset of which caused the plaintiffs to sell their Certificates just prior to May 13, 1985. They have been damaged thereby in the amount of their forfeited interest.

127. Although officials of the State of Maryland and MDIF have stated that they will guarantee repayment on Certificates of Deposit up to $100,000 per account, and MDIF specifically assumed all the assets and liabilities of MSSIC, MDIF has told owners of Certificates of Deposit that they would not be compensated for any interest which would accrue after November 8, 1985 or the difference between the interest rate which such Certificates bear and the 5½% interest rate which has been accrued on Certificates of Deposit which matured between May 13, 1985 and November 8, 1985.

128. Despite the fact that MDIF purportedly assumed all of the assets and liabilities of MSSIC, which include the obligations of MSSIC to repay immediately losses incurred by depositors and Certificate owners of savings and loans insured by MSSIC, MDIF has stated that no distribution of funds will be made to any owners of Certificates of Deposit before liquidation of the assets of Old Court, and before obligations to creditors of Old Court and depositors of Old Court with accounts other than Certificates of Deposit were satisfied. MDIF's representatives have also stated to owners of Old Court Certificates of Deposit,

including the named plaintiff George R. Lyon, that repayment on Old Court Certificates of Deposit could take anywhere between two and eighteen years.

129. Regardless of an eventual repayment of monies owed to the named plaintiffs and members of the class defined herein by MDIF or some other governmental agency or the State of Maryland, these plaintiffs have already suffered damage inasmuch as they have been deprived of the use of their money when they were entitled to it and will in all probability be deprived of this money for a significant time in the future. No state agency or other party has offered to pay damages based upon the present worth of funds due to plaintiffs and their future worth at some unknown date.

130. Plaintiffs have invested substantial amounts of their savings and funds in Old Court Certificates of Deposit and have thus suffered consequential damages and will continue to do so at an accelerated rate inasmuch as plaintiffs had relied upon the use of these funds to fulfill personal and business commitments and in many cases to maintain their present standards of living.

131. The class as defined at paragraph 1 of this Complaint is in compliance with Rules 23(a) and 23(b) (3) of the Federal Rules of Civil Procedure because:

(a) Because of the great number of investors in Old Court, the members of the Class are so numerous that joinder of all members is impracticable.

(b) The claims of plaintiffs are typical of the claims of all members of the Class and their common interest is to obtain relief for themselves and the Class for the violations of law set forth herein.

(i) All of the class members have received virtually the same information in virtually the same form from Old Court and MSSIC and relied upon such information in much the same way;

(ii) Defendants' wrongful conduct as alleged in this Complaint has the same relevance to all claims by members of the class. Such conduct includes, in

addition to the said misrepresentations to plaintiffs, the Old Court Defendants' theft of Old Court's assets for their personal use; the failure of MSSIC to regulate Old Court in accordance with its obligations; and the knowledge by MSSIC and failure to disclose it of Old Court violations of the rules of MSSIC and state regulatory agencies;

(iii) The Certificates of Deposit which form the basis for the claims alleged herein are virtually the same;

(iv) The conduct of MDIF toward all owners of Certificates of Deposit since the collapse of Old Court is the same as to all plaintiffs;

(v) Most damages suffered by plaintiffs can be calculated on the same basis because of the actions of MDIF and the orders of the Circuit Court for Baltimore City entered during the period of conservatorship and receivership of Old Court.

(c) Plaintiffs will fairly and adequately protect the interests of the Class and have retained competent counsel experienced in class action litigation to prosecute this action.

(d) A class action is superior to other available methods for the fair and efficient adjudication of this controversy since the Class is so numerous and its membership so widespread that joinder of all members is impracticable. There will be no difficulty in the management of this action as a class action since records of plaintiffs' Certificate Accounts are easily available from Old Court or its Receiver MDIF.

(e) Questions of law and fact common to the members of the Class exist and predominate over any questions affecting only individual members of the Class. Among the questions of law and fact common to the Class are:

(i) Whether the federal and state securities laws, common law and RICO were violated by defendants' acts and omissions as alleged herein;

(ii) whether defendants participated in and pursued the conspiracy and common course of conduct of which plaintiffs complain;

(iii) whether documents, releases, reports, and statements disseminated to the investing public during the class period omitted and/or misrepresented material facts about the businesses and financial conditions of Old Court and MSSIC;

(iv) whether the defendants acted wilfully or recklessly in omitting to state and/or misrepresenting material facts or in aiding and abetting the making of such misstatements;

(v) whether during the class period the attractiveness of Old Court Investment Certificates was artificially inflated due to the non-disclosures and/or misrepresentations complained of herein;

(vi) whether plaintiffs' funds have been unlawfully converted by MDIF or others; and

(vii) whether MDIF or the State of Maryland is obligated to pay plaintiffs' damages which include full restitution of their principal and agreed upon interest rate for the full period of time they have been deprived of their investments.

COUNT I

Violation of Section 10(b) of the Exchange Act and Rule 10b-5 by All Old Court Defendants and All MSSIC Defendants and VB&H

132. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 131.

133. During the period from November 1982 to May 13, 1985, defendants, singularly and in concert with each other and other unnamed parties engaged in or aided and abetted a plan, scheme and unlawful conspiracy and course of conduct, pursuant to which they knowingly or recklessly engaged in acts, transactions, practices, and courses of conduct which operated as a fraud upon plaintiffs and the Class, and made various untrue statements of material facts and omitted to state material facts in order to make the statements made, in light of the circumstances under which they were made, not misleading, to plaintiffs and the Class in connection with the sale of Old Court Certificates of Deposit to plaintiffs and the Class.

134. During the period from November 1982 to May 13, 1985, defendants, pursuant to such plan, scheme and unlawful conspiracy and course of conduct, knowingly or recklessly issued, caused to be issued, participated in the issuance of, or aided and abetted the preparation and issuance of the above referenced documents, including, but not limited to Old Court financial statements, as well as brochures and letters prepared by Old Court or MSSIC which contained the above reference misstatements of material fact or omitted to state the material facts.

135. The misstatements and omissions, taken individually and as a whole, were designed to and did create the false impression that the prospects for Old Court were bright; that it had developed operating techniques that were sound, prudent, and gave it a competitive edge in the savings and loan industry; that its loans were adequately collateralized and/or guaranteed by reputable, financially responsible borrowers; that it was profitable; that its profitability would continue to grow; that MSSIC was financially sound, that the insurance offered by MSSIC was completely reliable, and that an investment in Old Court would be safe.

136. All Defendants had actual knowledge of at least some of the materially false and misleading statements and omissions set forth herein.

137. Plaintiffs, relying on the said misrepresentations and omissions, and not knowing they were false, invested in Old Court Certificates of Deposit and sustained damages thereby.

138. Each of the defendants, in acting as hereinabove described, did so knowing that the insurance purportedly provided by MSSIC and advertised by Old Court and other savings & loan institutions in connection with the sale by Old Court of Certificates of Deposit by Old Court and other Maryland savings and loan associations was not what it was purported to be; that the true financial and operating condition of Old Court and MSSIC were poor; that the risks of loss from and the losses sustained or likely to be sustained from its poor banking practices were high; and of the falsity of the other misrepresentations and omissions alleged herein. With knowledge or reckless disregard of the facts as alleged herein, defendants disseminated or participated in the dissemination of the reports and statements referred to above knowing that they contained misstatements of or omitted to contain the material fact alleged herein.

139. By virtue of the foregoing, defendants have violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, and are liable thereunder to plaintiffs.

140. Each of the defendants is liable as a direct participant in, as a co-conspirator and/or as an aider and abettor, or of the wrongs complained of herein.

141. The Old Court directors, defendants Allan H. Pearlstein, Karol Levitt, Jerome Cardin, LCP Corporation and Light Street are liable to plaintiffs as controlling persons of Old Court.

142. MDIF is liable to plaintiffs on this claim as the successor in interest to MSSIC and as the receiver of Old Court.

COUNT II

Violation of the Racketeer Influenced and Corrupt Organization Act By Old Court Defendants and VB&H

143. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 142.

144. The Old Court defendants and VB&H were at all times relevant to the events alleged herein all either employed by or associated with an enterprise engaged in, or the activities of which affected, interstate commerce. That enterprise is an association in fact comprised of Old Court and the Old Court defendants, and Glass & Associates, and numerous other known and unknown persons and entities associated with one or more of the Old Court defendants and who were the recipients directly or indirectly of illegal or improper loans or payments from Old Court, including, but not limited to, the subsidiaries and affiliates of Old Court, Jeffrey A. Levitt, and Allan H. Pearlstein identified previously in this complaint.

145. In violation of 18 U.S.C. §§1962(c) and (d), defendants have conspired to conduct and have conducted or participated in the conduct of, directly or indirectly, the affairs of the enterprise identified in paragraph 127 above through a pattern of racketeering activity consisting of repeated acts of fraud in the sale of securities, as alleged in this complaint; repeated acts of theft and embezzlement as alleged herein and by the indictment referred to above and repeated acts of mail and wire fraud violative of 18 U.S.C. §§1341 and 1343 all of which occurred within 10 years of one another, including:

(a) Mailings of the above referenced brochures, letters and financial statements to prospective customers, and

(b) Mailings or wiring by investors of funds to be invested in Old Court induced by the misrepresentations and fraud of defendants including, but not limited to, the mailing of the funds invested by the named plaintiffs to Old Court.

146. Each of the Old Court defendants' and VB&H's racketeering activities, as set forth herein, were conducted for the purpose of furthering the enterprise's scheme of defrauding investors. Each such act had similar purposes, involved similar participants, namely the defendants, similar methods of commission and similar results impacting the same victims, namely, members of the Class. Thus, such acts constitute a pattern of

racketeering activity within the meaning of the Racketeer Influenced and Corrupt Organizations Act.

147. Each of the defendants agreed and conspired with other defendants and/or other unnamed partners to commit the above specified acts of racketeering activity, and agreed and conspired to conduct the affairs of the above identified enterprise through a pattern of racketeering activity.

148. By reason of defendants' violations of 18 U.S.C. §§1962(c) and (d) as alleged herein, the members of the Class have been injured in their business and property in that (a) they each invested substantial sums of money in Old Court; and (b) they each have suffered losses as a result of those investments.

149. MDIF is liable to the plaintiffs on this claim as the receiver of Old Court.

COUNT III

Violation of the Racketeer Influenced and Corrupt Organization Act by the MSSIC Defendants and VB&H

150. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 149.

151. The MSSIC defendants and VB&H were at all times relevant to the events alleged herein in either employed by or associated with an enterprise engaged in, or the activities of which affected, interstate commerce. That enterprise is an association in fact comprised of MSSIC, all of its member savings and loan associations, and the Governmental Entities.

152. In violation of 18 U.S.C. §§1962(c) and (d), the MSSIC defendants have conspired to conduct and have conducted or participated in the conduct of, directly or indirectly, the affairs of the enterprise identified in paragraph 133 above through a pattern of racketeering activity consisting of repeated acts of fraud in the sale of securities, as alleged in this Complaint; and repeated acts of mail and wire fraud violative of 18 U.S.C. §§1341 and 1343 all of which occurred within 10 years of one another, including:

(a) Mailings of the above referenced brochures, letters and financial statements to prospective customers, and

(b) Mailings or wiring by investors of funds to be invested in Old Court.

153. Each of the MSSIC defendants' and VB&H's racketeering activities, as set forth herein, was conducted for the purpose of furthering the enterprise's scheme of defrauding investors to continue to invest in Old Court and other Maryland savings and loan associations in order to avoid criticism of themselves and MSSIC and liquidation of MSSIC. Each such act had similar purposes, involved similar participants, namely the MSSIC defendants, similar methods of commission and similar results impacting the same victim, namely members of the Class. Thus, such acts constitute a pattern of racketeering activity within the meaning of the Racketeer Influenced and Corrupt Organizations Act.

154. Each of the defendants agreed and conspired with other defendants and/or co-actors to commit the above specified acts of racketeering activity, and agreed and conspired to conduct the affairs of the above identified enterprises through a pattern of racketeering activity.

155. By reason of defendants' violations of 18 U.S.C. §§1962(c) and (d) as alleged herein, the Class has been injured in its business and property in that (a) they each invested substantial sums of money in Old Court; and (b) they each have suffered losses as a result of those investments.

156. MDIF is liable to plaintiffs on this claim as the successor in interest to MSSIC.

COUNT IV

Common Law Fraud, Deceit, Negligent and Intentional Misrepresentation By All Defendants

157. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 156.

158. The aforementioned misrepresentations and omissions were made by defendants intentionally knowing they were false, or in reckless disregard thereof, to artificially inflate the attractiveness of Old Court Certificates of Deposit, and to induce plaintiffs to invest in those Certificates of Deposit, with

knowledge that the plaintiffs and class members were relying on defendants' misrepresentations and omissions.

159. Plaintiffs, relying on the said misrepresentations and omissions, and not knowing they were false, invested in Old Court Certificates of Deposit and sustained damages thereby.

160. By reason of the foregoing, defendants are guilty of common law fraud, deceit and intentional misrepresentations.

161. MDIF is liable to plaintiffs on this claim as the successor in interest to MSSIC and as the receiver of Old Court.

COUNT V

Violation of the Maryland Securities Act and other applicable state securities laws by All Old Court Defendants, All MSSIC Defendants and VB&H

162. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 161.

163. By virtue of the foregoing, defendants have violated section 11-301 of the Maryland Securities Act, Md. Corps. & Assn's Code Ann. §11-301, and other applicable state securities laws, including Mich. Comp. Laws §451.501; N.J. Rev. Stat. §49:3052; N.Y. Gen. Bus. Law §339-a; and 70 Pa. Stat. Ann. §1-401.

164. This Count is brought by all named defendants and putative class members for violation of the Maryland law. In addition, it is brought by the named plaintiffs who are citizens of the states listed other than Maryland under the statutes of such state on their own behalf and and on behalf class members who are citizens of such state.

165. MDIF is liable to plaintiffs on this claim as the successor in interest to MSSIC and as the receiver of Old Court.

COUNT VI

Breach of Contract by Old Court

166. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 165.

167. Old Court's failure to pay to its investors the sums invested by them in Old Court Certificates of Deposit constitutes a breach of the contracts between Old Court and each of the plaintiffs.

168. MDIF is liable on this claim as the receiver of Old Court.

COUNT VII

Breach of Contract by MSSIC

169. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 168.

170. Despite Old Court's failure, MSSIC has failed to pay to each depositor in Old Court as of May 13, 1985, including plaintiffs, the amount of their investments (up to a maximum of $100,000 per account) pursuant to the terms of its contractual obligations to them.

171. By virtue of the foregoing, MSSIC has breached its contractual obligations to members of the class.

172. MDIF is liable on this claim as the successor in interest to MSSIC.

COUNT VIII

Conversion by Old Court

173. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 172.

174. Plaintiffs are unable to withdraw all or any part of their Certificates of Deposit in Old Court, either the principal amounts thereof or accrued interest.

175. Old Court, by its conservator and later receiver MDIF, has converted plaintiffs' property by refusing to accrue interest on Old Court Certificates of Deposits at the rate stated on such certificates, but rather accruing interest on all Certificates of Deposits which matured between May 13, 1985 and November 8, 1985 at the rates of 5½ percent, and refusing to accrue any interest whatsoever on plaintiffs' Old Court Certificates of Deposit after November 8, 1985 no matter how long it

takes MDIF or anyone else to release any money to plaintiffs due on their Certificates of Deposit.

176. MDIF is liable on this claim as the successor in interest to Old Court.

COUNT IX

Breach of Fiduciary Obligations by All MSSIC Defendants and All Old Court Defendants

177. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 176.

178. By virtue of the foregoing, all of the MSSIC Defendants and all of the Old Court Defendants have breached their fiduciary obligations owed to the plaintiffs.

179. MDIF is liable to plaintiffs on this claim as the successor in interest to MSSIC and as the receiver of Old Court.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs demand judgment on behalf of themselves and all the other members of the Class, as follows:

(a) Determining that this action is a proper Class Action under Rule 23 of the Federal Rules of Civil Procedure, an that the Class Action be so maintained on behalf of the Class defined, above:

(b) Awarding damages, compensatory and punitive, in favor of plaintiffs and other Class Members;

(c) Awarding treble damages in favor of plaintiffs and other Class Members pursuant to 18 U.S.C. §1965(c).

(d) Awarding to plaintiffs prejudgment interest, the costs and disbursements of this action, including reasonable allowances of fees for plaintiffs' attorneys, accountants and experts and reimbursement of plaintiffs' expenses; and

(d) Granting such other further relief as this Court may deem just and proper.

Judith R. Cohn
Brian P. Flaherty

OF COUNSEL:

WOLF, BLOCK, SCHORR AND SOLIS-COHEN
Twelfth Floor Packard Building
Philadelphia, Pennsylvania 19102
(215) 977-2000

LAWRENCE I. WEISMAN
WEISMAN & CLARKE
306A Hampton Plaza
300 East Jappa Road
Towson, MD 21204
(301) 583-9001

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANCINE TAFFLIN, 106 West Cheltenham Avenue, Philadelphia, Pennsylvania 19120,	:	CIVIL ACTION NO. 86-0092
and	:	
SEYMOUR ZUCKERMAN, 834 Columbus Drive, Teaneck, New Jersey 07666,	:	
and	:	
ERIS ZUCKERMAN, 834 Columbus Drive, Teaneck, New Jersey 07666,	:	
and	:	
RENALEE SELVIN, 210 West 70th Street, New York, New York 10023,	:	
and	:	
JOAN ZUCKERMAN, 210 West 70th Street, New York, New York 10023,	:	
and	:	
SYLVIA ZUCKERMAN, 1705 Caton Avenue, Brooklyn, New York,	:	
and	:	

SEYMOUR ZUCKERMAN,
Executor of the Estate of Samuel Zuckerman,
834 Columbia Drive,
Teaneck, New Jersey 07666,

and

GEORGE R. LYON,
511 Wallace Street,
Birmingham, Michigan 48009,

and

GEORGE C. LYON,
1317 Smith Street,
Royal Oak, Michigan 48073,

and

PETER M. LYON,
511 Wallace Street,
Birmingham, Michigan 48009,

and

BRUCE K. LYON,
511 Wallace Street,
Birmingham, Michigan 48009,

and

ELIZABETH A. LYON,
511 Wallace Street,
Birmingham, Michigan 48009,

and

GEORGE R. LYON and MARY G. LATHROP, Personal Representatives of the Estate of George M. Lyon,
511 Wallace Street,
Birmingham, Michigan 48009,

and

WINDELL R. CARTER, JR.,
6409 North 10th Street,
Philadelphia, Pennsylvania 19126,

and

CATHERINE CARTER,
6409 North 10th Street,
Philadelphia, Pennsylvania 19126,

and

RIO GRANDE SAVINGS AND LOAN ASSOCIATION,
901 First Avenue,
Monte Vista, Colorado,

and

ENTERPRISE EQUIPMENT CO., INC.,
857 Washington Street,
East Weymouth, MA 02189,

and

GERTRUDE DURSO,
William Penn House, Apt. 2808,
1919 Chestnut Street,
Philadelphia, PA 19103,

and

CARMEN R. GOLDINGS,
65 Sterling Street,
West Newton, MA 02165,

and

SARAH M. GOLDINGS,
1284 Beacon Street,
Brookline, MA 02146,

and

HERBERT J. GOLDINGS,
65 Sterling Street,
West Newton, MA 02165,

and

ETHAN D. GOLDINGS,
65 Sterling Street,
West Newton, MA 02165,

and

CLELIA S. GOLDINGS,
65 Sterling Street,
West Newton, MA 02165,

and

DORIS KONIG,
315 West 86th Street, Suite 15B,
New York, NY 10024,

and

MITCHELL W. LANDY,
3901 Conshohocken Avenue,
Apt. 220,
Philadelphia, PA 19131,
PLAINTIFFS,

v.

JEFFREY A. LEVITT,
11408 Woodland Avenue,
Lutherville, Maryland 21093,

and

LCP CORPORATION,
16 South Calvert Street,
Baltimore, Maryland 21201,

and

ALLAN H. PEARLSTEIN,
3704 Bretton Way,
Pikesville, Maryland 21208,

and

JEROME S. CARDIN,
6615 Reisterstown Road,
Baltimore, Maryland 21215,

and

LIGHT STREET PARTNERSHIP,
16 South Calvert Street,
Baltimore, Maryland 21201,

and

ALLEN FEINBERG,
3303 Garrison Farms Road,
Baltimore, Maryland 21208,

and

DAVID UHLFELDER,
1515 Reisterstown Road,
Baltimore, Maryland 21208,

CARMEN R. GOLDINGS,
65 Sterling Street,
West Newton, MA 02165,

and

SARAH M. GOLDINGS,
1284 Beacon Street,
Brookline, MA 02146,

and

HERBERT J. GOLDINGS,
65 Sterling Street,
West Newton, MA 02165,

and

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and

CLELIA S. GOLDINGS,
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and

DORIS KONIG,
315 West 86th Street, Suite 15B,
New York, NY 10024,

and

MITCHELL W. LANDY,
3901 Conshohocken Avenue,
Apt. 220,
Philadelphia, PA 19131,
PLAINTIFFS,

v.

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6615 Reisterstown Road,
Baltimore, Maryland 21215,

and

LIGHT STREET PARTNERSHIP,
16 South Calvert Street,
Baltimore, Maryland 21201,

and

ALLEN FEINBERG,
3303 Garrison Farms Road,
Baltimore, Maryland 21208,

and

DAVID UHLFELDER,
1515 Reisterstown Road,
Baltimore, Maryland 21208,

and

ROBERT D. PEARLSTEIN,
10806 Long Acre Lane,
Stevenson, Maryland 21143,

and

SA[illegible]EL SHOUBIN,
290[illegible] Terry Drive,
Baltimore, Maryland 21209,

and

DENNIS E. GUIDICE,
1612 Ross Road,
Forest Hill, Maryland 21050,

and

KAROL LEVITT,
11408 Woodland Avenue,
Lutherville, Maryland 21093,

and

ROSEMARY PEARLSTEIN,
3704 Bretton Way,
Pikesville, Maryland 21208,

and

OLD COURT SAVINGS & LOAN, INC.,
16 South Calvert Street,
Baltimore, Maryland 21201,
or, c/o MARYLAND DEPOSIT INSURANCE FUND CORPORATION, RECEIVER,
114 E. Lexington Street,
Baltimore, Maryland 21102,

and

MARYLAND SAVINGS SHARE INSURANCE CORP.,
115 East Lexington Street,
Baltimore, Maryland 21202,

and

MARYLAND DEPOSIT INSURANCE FUND CORPORATION,
114 E. Lexington Street,
Baltimore, Maryland 21102,

and

CHARLES C. HOGG, II,
6105 Buckingham Manor,
Baltimore, Maryland 21210, or
114 East Lexington Street,
Baltimore, Maryland 21202,

and

PAUL B. TRICE, JR.,
114 East Lexington Street,
Baltimore, Maryland 21202,

and

GEORGE W. H. PIERSON,
400 East Pratt Street,
Baltimore, Maryland; or
300 Old Trail,
Baltimore, Maryland 21212,

and

JEROME F. DOLIVKA,
1613 Chesaco Avenue,
Baltimore, Maryland 21237,

and

FRANCES F. ANDERSON,
900 Crain Highway South,
Baltimore, Maryland 21061,

and

MICHAEL J. DIETZ,
7034 Dunbar Road,
Baltimore, Maryland 21228,

and

LEONARD BASS,
3911 Noyes Circle,
Randallstown, Maryland 21133, or
Munsey Building,
Baltimore, Maryland 21202, or
2421 Forest Green Road,
Pikesville, Maryland 21208,

and

JOHN C. DONOHUE, SR.,
5603 Roland Avenue,
Baltimore, Maryland 21210,

and

HENRY R. ELSNIC,
21 Buchannon Road,
Woodbrook, Maryland 21217,

and

JOHN D. FAULKNER, JR.,
114 East Lexington Street,
Baltimore, Maryland 21202,

and

JAMES D. LAUDEMAN,
3838 Roland Avenue,
Baltimore, Maryland,

and

TERRY L. NEIFELD,
2911 Erie Avenue,
Carney, Maryland,

and

GLASS AND ASSOCIATES, P.A.,
2 Hopkins Plaza,
714 Mercantile Bank & Trust
Building,
Baltimore, Maryland 21201,

and

CARDIN AND CARDIN, P.A.,
6615 Reisterstown Road,
Baltimore, Maryland 21215,

and

VENABLE, BAETJER AND
HOWARD,
1800 Mercantile Bank &
Trust Building,
2 Hopkins Plaza,
Baltimore, Maryland 21201,
DEFENDANTS.

AMENDED COMPLAINT

1. Plaintiffs' bring this action individually and on behalf of a class consisting of all persons who are citizens of the District of Columbia or of states other than Maryland, who during the period from September 1, 1982 through May 13, 1985 purchased or renewed Certificates of Deposit of Old Court Savings & Loan, Inc. ("Old Court"); and who held such Certificates of Deposit on May 13, 1985, their heirs, executors, successors and assigns (the "Old Court Out of State Class"), against defendants for violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78j(b), and Rule 10b-5 promulgated by the Securities and Exchange Commission thereunder; the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO") 19 U.S.C. §§1961-1968; Section 11-301 of the Maryland Securities Act ("Maryland Act"), Md. Corps. & Assns. Code Ann. §11-301; applicable provisions of securities laws of the several states in which various plaintiffs live, including Michigan, Mich. Comp. Laws, §451.501; New Jersey, N.J. Rev. Stat. §49:3052; New York, N.Y. Gen. Bus. Law §339-a; and Pennsylvania, 70 P.S. §1-401; and the common law of fraud, deceit, misrepresentation, malfeasance, breach of contract and conversion and violation of fiduciary obligations. In the alternative, plaintiff's individual claims and claims on behalf of those similarly situated may require subclasses represented by various named plaintiffs.

2. Each of the named plaintiffs and the members of the Old Court Out of State Class is a citizen of the District of Columbia or of a state other than Maryland, and each of the defendants is a citizen of Maryland. The amount in controversy exceeds $10,000 exclusive of interest and costs.

3. This Court has jurisdiction of this action pursuant to Section 27 of the Exchange Act, as amended, 15 U.S.C. §78aa; Section 1331, 1332 and 1337 of the Judicial Code, 28 U.S.C. §1331, 28 U.S.C. §1332(a)(1); 28 U.S.C. §1337; 18 U.S.C. §1964 and priciples of pendent jurisdiction.

4. Many of the acts and transactions constituting the violations of the Exchange Act by defendants alleged herein,

including, *inter alia,* the distribution and dissemination of false and misleading information (both written and oral) regarding Old Court and Maryland Savings Share Insurance Corporation ("MSSIC"), and the several instances of racketeering activities alleged herein, occurred in the Eastern District of Pennsylvania, and certain of the claims asserted herein arose in this district. Many such acts occurred in the Commonwealth of Pennsylvania, the States of New Jersey, New York, Michigan, Maryland and in all probability virtually all other states and the District of Columbia.

5. Each of the defendants does or transacts business in this district.

6. Each of the defendants either directly or indirectly disseminated advertising material in this district through the placement of advertisements in newspapers which defendants knew were regularly sold, distributed and circulated in this district including the Philadelphia Inquirer, the New York Times, and The Wall Street Journal which offered for sale to citizens and residents of this district, as well as other persons, Certificates of Deposits and other securities sold by Old Court and/or other Maryland savings and loan institutions insured by MSSIC.

7. Venue is proper in this district pursuant to Section 27 of the Exchange Act, 15 U.S.C. §78aa; 28 U.S.C. §1391(a); 28 U.S.C. §1391(b) and 28 U.S.C. §1391(c); and 18 U.S.C. §1965.

8. In connection with the acts, conduct, combinations and conspiracies alleged in this Complaint including, *inter alia,* the dissemination of false and misleading communications and racketeering activities, the defendants directly and indirectly used the means and instrumentalities of interstate commerce, including the United States mail and interstate telephone communication.

9. The Certificates of Deposit sold by Old Court and purchased by the named plaintiffs and the putative class members are securities within the meaning of Section 10(b) of the Exchange Act, Rule 10b-5 promulgated thereunder, and applicable state securities laws.

10. The Certificates of Deposit offered for sale by Old Court competed for investment funds with other securities including, but not limited to, stocks, bonds, money market funds, mutual funds and other investment contracts offered by other financial institutions and were advertised for sale in the same contexts as those other securities in newspapers and otherwise.

11. The only deposits, accounts or investments sold by Old Court to residents of the District of Columbia and states other than Maryland were its Certificates of Deposit. Such Certificates had various terms to maturity including one year, five years, 90 days, and 180 days. All the Old Court Certificates of Deposit carried a penalty of 100% loss of interest for early withdrawals.

12. Virtually all sales of Certificates of Deposit from Old Court to non-residents of Maryland were made through the United States mails.

13. Plaintiff, Francine Tafflin is an individual citizen of the State of Pennsylvania who resides at 106 West Cheltenham Avenue, Philadelphia, Pennsylvania 19120.

14. She purchased Certificates of Deposit from Old Court as identified below:

Certificate No.	Date of Purchase	Amount
04-700350-6	10/28/83	$50,000
04-703045-3	10/18/84	$20,000

The interest rate agreed upon by Francine Tafflin and Old Court at the date she purchased Certificate No. 04-703045-3 was 13% (14.1% compounded daily). The interest rate agreed upon for the earlier Certificate purchased in 1983 and renewed at maturity as set forth below was 11.3% for the original period and 14.1% for the renewal period.

15. Pursuant to the terms of Certificate No. 04-700350-6 purchased by plaintiff Francine Tafflin on October 28, 1983, Ms. Tafflin collected the interest which accrued up to the original date of maturity, October 28, 1984, and at that time renewed the Certificate for an additional year relying on assurances by Old Court that a renewal of the Certificate would also be fully insured and carried no risk of loss.

16. The Certificates of Deposit purchased by Francine Tafflin identified in paragraph 14 above had maturity dates of one year from the date of purchase with an option to renew at the end of that period. Certificate of Deposit 04-703045-3 matured on or about October 18, 1985 and Certificate of Deposit 04-700350 matured first on October 28, 1984 and again, after renewal, on October 28, 1985. Ms. Tafflin was unable to receive either interest or principal on those Certificates at the dates of maturity although interest was accrued at the agreed upon rate prior thereto. For the period between the maturity date of these Certificates and November 8, 1985 interest on them was accrued at the rate of 5½ percent, rather than the agreed upon rate of interest, and from November 8, 1985 to date, no interest has been accrued on these Certificates and plaintiff has been denied her rights to withdraw any funds from Old Court for the reasons stated later in the Complaint.

17. Although title to the Certificates of Deposit purchased by Francine Tafflin was in her name, part of the funds used to purchase these Certificates belonged to her seventy-eight year old mother, Sarah Tafflin, with whom she resides, and Sarah Tafflin is in part the beneficial owner of these Certificates of Deposit. The funds used to purchase these Old Court Certificates of Deposit constituted virtually the entire life savings of this plaintiff and her mother.

18. Plaintiff Francine Tafflin learned of the sale of Old Court Certificates of Deposit from the Philadelphia Inquirer, a newspaper regularly circulated in this district, which she read in this district. She made interstate telephone calls and engaged in telephone conversations with representatives of Old Court, MSSIC and the Division of Savings and Loan of the State of Maryland, all of whom assured her of the safety of her investment in Old Court Certificates of Deposit. In response to her inquires she received through the United States mail written material from Old Court and MSSIC which described these Certificates as fully insured and risk free.

19. Plaintiffs allege, on information and belief, that many other citizens of Pennsylvania including citizens and residents of

this district (who are class members) purchased Old Court Certificates of Deposit through similar means.

20. Plaintiffs Seymour Zuckerman and Eris Zuckerman are individual citizens of the State of New Jersey who reside at 834 Columbus Drive, Teaneck, New Jersey 07666. Plaintiffs Renalee Selvin and Joan Zuckerman are individual citizens of the State of New York who reside at 210 West 70th Street, New York, New York 10023; and plaintiff Sylvia Zuckerman is an individual citizen of the State of New York who resides at 1705 Caton Avenue, Brooklyn, New York (hereinafter sometimes referred to collectively as the Zuckerman Plaintiffs.)

21. Seymour Zuckerman is the executor of the Estate of Samuel Zuckerman, his father.

22. Plaintiffs Seymour, Eris, Joan and Sylvia Zuckerman, Renalee Selvin and Samuel Zuckerman, now deceased, either individually, jointly or as trustee for another, purchased Certificates of Deposit from Old Court as identified below:

Purchaser	Certificate No.	Date of Purchase	Amount
Renalee Selvin and Seymour Zuckerman	04-703974-3	12/10/84	$30,000
Joan Zuckerman and Seymour Zuckerman	04-703975-0	12/10/84	$25,000
Seymour Zuckerman and Eris Zuckerman	04-703977-6	12/10/84	$80,000
Seymour Zuckerman, trustee for Eris Zuckerman	04-704767-0	1/22/85	$90,000
Seymour Zuckerman, trustee for Joan Zuckerman	04-704765-4	1/22/85	$31,902.23
Seymour Zuckerman, trustee for Renalee Selvin	04-704766-2	1/22/85	$31,902.23
Samuel Zuckerman and Seymour Zuckerman	04-703976-8	12/10/84	$80,000
Seymour Zuckerman, trustee for Samuel Zuckerman	04-704769-6	1/22/85	$90,000

Purchaser	Certificate No.	Date of Purchase	Amount
Samuel Zuckerman, trustee for Seymour Zuckerman	04-704770-0	1/22/85	$53,170.41
Samuel Zuckerman, trustee for Sylvia Zuckerman	04-704768-8	1/22/85	$90,000

The interest rates on the above Certificate of Deposits were 12.25%-13.22% on the first three Certificates; 11.75-12.70% on the next three Certificates; 12.25-13.22% on the next Certificate; and 11.75%-12.70% on the last three Certificates.

23. Each of the Certificates purchased by the Zuckerman plaintiffs identified in paragraph 22 above had a maturity date of one year following its purchase, with an option to renew for an additional period of time.

24. On May 20, 1985, the owners of the foregoing Certificates (with the exception of the last two listed Certificates) withdrew $1,000 from each account. The Zuckerman Plaintiffs have been unable to withdraw any further money (principal or interest) on the foregoing Certificates of Deposit including those which have already matured and are payable on demand by the terms thereof, and as of November 8, 1985, no interest has been accrued on any of the foregoing Certificates for the reasons stated later in this Complaint. The Zuckerman Plaintiffs believe that they will be unable to redeem the Certificates which mature on January 22 for the same reason.

25. Plaintiff Seymour Zuckerman on behalf of himself and the other Zuckerman Plaintiffs learned of the sale of Old Court Certificates from the New York Times, which is regularly circulated in New York and New Jersey, and which he read and received in either New York or New Jersey; made interstate telephone calls to representatives of Old Court, MSSIC and the Division of Savings and Loan of the State of Maryland, and received in response to his inquires about Old Court written material through the United States mails including financial statements of Old Court which are now known to be false and upon which he relied. In response to all inquiries, plaintiff Seymour Zuckerman was assured, both orally and through the

written material which he received, that Old Court Certificates of Deposit were risk-free and fully insured.

26. Plaintiffs George R. Lyon, Peter M. Lyon, Bruce K. Lyon, Elizabeth A. Lyon, the Estate of George M. Lyon by George R. Lyon and Mary G. Lathrop as personal representatives are individual citizens of the State of Michigan who reside at 511 Wallace Street, Birmingham, Michigan 48009, and plaintiff George C. Lyon is an individual citizen of the State of Michigan who resides at 1317 Smith Street, Royal Oak, Michigan 48073 (hereinafter collectively referred to as the Lyon Plaintiffs).

27. The Lyon Plaintiffs either individually, jointly or as the personal representatives of the Estate of George R. Lyon purchased Certificates of Deposit from Old Court as identified below:

Purchaser	Certificate No.	Date of Purchase	Amount
George C. Lyon and Peter M. Lyon and Bruce K. Lyon	04-303528-0	3/7/85	$50,947.71
George C. Lyon and Peter M. Lyon and Bruce K. Lyon	04-303527-2	3/7/85	$50,000.00
George R. Lyon and Peter M. Lyon and Bruce K. Lyon	04-303367-2	3/1/85	$50,500.00
George R. Lyon and Elizabeth A. Lyon and George C. Lyon	04-303368-0	3/1/85	$50,500.00
Estate of George M. Lyon and by George R. Lyon and Mary G. Lathrop, personal representatives	04-303859-7	4/8/85	$ 3,427.76

28. All of the foregoing Certificates owned by the Lyon plaintiffs, by their terms matured 91 days from the date of purchase, and included the right to renew for an additional 91 days. The interest rate on each of the Certificates identified in paragraph 27 above, except Certificate No. 04-303859-7, was 11½%. The interest rate on Certificate No. 04-303859-7 was

11¼%. Certificate No. 04-303367-2 and Certificate No. 04-303368-0 were renewed on their original maturity date, May 31, 1985, and Certificate No. 04-303527-2 and Certificate No. 04-303528-0 were renewed on their original maturity date, June 6, 1985, for an additional 91 day period, and interest on these Certificates was accrued at the agreed upon rate of 11½% prior to August 30, 1985 and September 5, 1985, respectively. Subsequent thereto, and through November 8, 1985, interest on the aforementioned Certificates was accrued at 5½%. Certificate No. 04-303859-7, which matured on July 8, 1985, was not renewed at all by Old Court, but was converted immediately into a regular savings account and interest at the rate of 5½% was accrued from that date through November 8, 1985. No interest was accrued for any period after November 8, 1985 on any of the Lyon Plaintiffs' Certificates. The Lyon Plaintiffs have been unable to redeem or collect any interest or principal on the Certificates of Deposit referred to herein for the reasons set forth later in this Complaint.

29. Plaintiff George R. Lyon learned of the sale of Certificates of Deposit from advertisements in the New York Times, a newspaper with national circulation which he read regularly in his hometown in Michigan. He on his own behalf and on behalf of the other Lyon Plaintiffs made inquires by interstate telephone calls to Old Court, MSSIC and the Division of Savings and Loan of the State of Maryland, and received in response various written material, including financial statements of Old Court. He was assured by representatives of both Old Court and MSSIC orally and in the written materials he received that Old Court Certificates of Deposit were safe investments and fully insured from all risk of loss.

30. Plaintiffs Windell R. Carter, Jr. and Catherine Carter are individual citizens of the State of Pennsylvania who reside at 6409 North 10th Street, Philadelphia, Pennsylvania 19126.

31. Plaintiff Windell Carter and Catherine Carter purchased Certificates of Deposit from Old Court as identified below:

Certificate No.	Date of Purchase	Amount
04-704147-6	12/17/84	$10,000
04-075560-6	02/14/85	$10,000
04-703002-7	10/15/85	$10,000
04-704604-2	01/15/85	$10,000
04-703469-1	11/15/84	$10,000
04-701288-8	06/18/84	$10,000
06-701135-7	05/07/85	$20,000
04-705953-9	03/04/85	$70,000

32. All of the foregoing Certificates by their terms matured one year from the date of purchase, with an option to renew for an additional period of time. The Carter plaintiffs have been unable to withdraw any money on the foregoing Certificates including those which have already matured and are payable on demand by the terms thereof, and as of November 8, 1985 no interest has been accrued on any of the foregoing Certificates for the reasons stated later in this Complaint.

33. Plaintiff Catherine Carter, as executor of the estate of Barbara Carter, purchased a Certificate of Deposit on June 11, 1984, No. 04-701274-1, in the amount of $63,525.57. The Certificate had a stated term of one year and matured on June 11, 1985. Mrs. Carter was unable to receive interest or principal on her Certificate at the date of maturity although interest was accrued at the agreed upon rate prior thereto. For the period between the maturity date of this Certificate and November 8, 1985 interest was accrued at the rate of 5½ percent, rather than the higher agreed upon rate of interest, of approximately 12 percent; and from November 8 to date, no interest has been accrued on this Certificate and plaintiff has been denied her rights to withdraw any funds from Old Court for the reasons stated later in the Complaint.

34. Plaintiff Windell Carter on behalf of himself and Catherine Carter learned of the sale of Old Court Certificates from newspapers regularly circulated in Philadelphia which he received and read there; made interstate telephone calls to representatives of Old Court and MSSIC and received in

response to his inquiries about Old Court written material through the United States mails, including financial statements of Old Court which are now known to be false and upon which be relied. In response to all of his inquiries, Windell Carter was assured, both orally and through written material which he received, that Old Court Certificates of Deposit were risk free and fully insured.

35. Specifically, Mr. Carter was advised by a letter from MSSIC that MSSIC regulations were enforced and precluded any fraudulent activity by member associations; that MSSIC "guarantee[d] payment of 100 cents on the dollar, to the limit of $100,000 per account"; that no MSSIC depositor had ever lost money; and that MSSIC was a "very stringent and full-time organization." These representations were typical of those made by letter and telephone conversation to other Old Court depositors who inquired of MSSIC as to the safety of their deposits in Old Court.

36. Rio Grande Savings & Loan Association ("Rio Grande") is a Colorado Chartered Savings and Loan Association having a principal place of business at 901 First Avenue, Monte Vista, Colorado.

37. On March 4, 1985 Rio Grande purchased from Old Court through an investment broker, First Investment Securities, Inc., of Little Rock, Arkansas, an Old Court Certificate of Deposit No. 04-855726-8 in the amount of $100,000. It matures on March 5, 1990. Rio Grande received dividend payments on the Certificate of Deposit on April 8, May 6 and June 10, 1985, but has received no dividend payments since that time, and has been unable to obtain the principal amount of the Certificate.

38. Rio Grande became aware of the sale of Old Court Certificates of Deposit through First Investment Securities, Inc. which assured Rio Grande, on behalf of Old Court, of the safety of investments made in Old Court and represented, *inter alia*, that the Certificates of Deposit were fully insured by the Federal Savings and Loan Insurance Corporation.

39. Enterprise Equipment Co., Inc. is a Massachusetts corporation having its principal place of business at 857 Washington Street, East Weymouth, Massachusetts 02189.

40. On October 1, 1984, Enterprise Equipment Co. purchased an Old Court Certificate of Deposit No. 04-702758-8 in the amount of $50,000. It matured one year from the date of purchase with an option to renew for an additional period of time.

41. Plaintiff Gertrude Durso is an individual citizen of the State of Pennsylvania who resides at William Penn House, Apartment 2808, 1919 Chestnut Street, Philadelphia, Pennsylvania 19103. On February 15, 1985 she purchased an Old Court Certificate of Deposit No. 04-705568-9 in the amount of $10,000. It matured one year from the date of purchase.

42. Carmen R. Goldings is an individual citizen of the State of Massachusetts who resides at 65 Sterling Street, West Newton, Massachusetts 02165. Sarah M. Goldings is an individual citizen of the State of Massachusetts who resides at 1284 Beacon Street, Brookline, Massachusetts 02146. On October 12, 1984 they purchased in their capacity as trustees for the Herbert J. Goldings, M.D. and Carmen R. Goldings, M.D., P.C. Pension Plan an Old Court Certificate of Deposit No. 04-855334-4 in the amount of $100,000. It had a maturity date one year from the date of purchase.

43. Herbert J. Goldings, M.D. and Ethan D. Goldings are individual citizens of the State of Massachusetts who reside at 65 Sterling Street, West Newton, Massachusetts 02165. On April 23, 1985 they purchased Old Court Certificate of Deposit No. 04-303980-5 in the amount of $6,300. That Certificate of Deposit matured six months from the date of its purchase, with an option to renew for an additional period of time.

44. Clelia S. Goldings is an individual citizen of the State of Massachusetts who resides at 65 Sterling Street, West Newton, Massachusetts 02165. On December 18, 1984 she and Herbert J. Goldings purchased Old Court Certificate of Deposit No. 04-704122-3 in the amount of $13,400 and on February 26, 1985 purchased 06-700841-6 in the amount of $4,000. Each of the foregoing Certificates of Deposit had a maturity date of one year from the date of purchase.

45. Doris Konig is an individual citizen of the State of New York who resides at 315 West 86th Street, Suite 15B, New York,

New York 10024. She purchased certificates of deposit from Old Court as identified below:

Certificate No.	Date of Purchase	Amount
04-703412-8	11/13/84	$ 3,000.00
04-703505-6	11/19/84	1,500.00
06-700460-5	12/21/84	8,986.76
04-706217-2	3/21/85	4,569.16

46. All of the foregoing certificates by their terms matured one year from the date of purchase with an option to renew for an additional period of time.

47. Mitchell W. Landy is an individual citizen of the state of Pennsylvania who resides at 3901 Conshohocken Avenue, Apartment 220, Philadelphia, Pennsylvania 19131. On February 20, 1985 he purchased an Old Court Certificate of Deposit No. 04-705637-5 in the amount of $90,000. This Certificate of Deposit had a maturity one year following its issuance.

48. Plaintiffs Enterprise Equipment Co., Inc., Gertrude Durso, Carmen R. Goldings, Sarah M. Goldings, Herbert J. Goldings, Ethan D. Goldings, Clelia S. Goldings, Doris Konig, and Mitchell W. Landy learned of the sale of Old Court Certificates of Deposit from advertisements in one or more of the following newspapers, *The Philadelphia Inquirer*, *The Wall Street Journal*, and *The New York Times*, one or more of which are regularly circulated in the several districts in which they live. In addition, they received in response to their inquiries through the United States Mail written material from Old Court and MSSIC which described the certificates as fully insured and risk free and some of them made interstate telephone calls and engaged in telephone conversations with representatives of Old Court, MSSIC and/or the Division of Savings and Loan of the State of Maryland, all of whom assured them of the safety of their investments in Old Court Certificates of Deposit.

49. None of those defendants have had access to the interest or principal amounts of their Certificates of Deposit. Certificates of Deposit maturing prior to November 8, 1985, were renewed into successive thirty-day Certificates of Deposit accruing interest at 5½ percent, and since on or about November 8, 1985, no

further interest has been accruing on any of the Certificates of Deposit, whether or not they have matured.

50. Old Court held a toll-free "800" telephone number for use by persons in states other than Maryland. Plaintiffs allege on information and belief that this number was used either exclusively or primarily in connection with the sale of Old Court Certificates of Deposit to citizens and residents of states other than Maryland.

51. Defendant Old Court Savings and Loan, Inc. ("Old Court") is a Maryland Corporation chartered as a Maryland Savings and Loan Association in 1960. From that date until May 13, 1985 it held itself out to the public as a safe and well managed savings and loan institution. Its principal place of business was 16 South Calvert St., Baltimore, Maryland.

52. On in November 8, 1985 Old Court was put in receivership in the Circuit Court for Baltimore City, Maryland. Defendant Maryland Deposit Insurance Fund Corporation ("MDIF") is the receiver of Old Court.

53. From approximately June 1, 1985 to November 8, 1985, Old Court was in conservatorship in the Circuit Court for Baltimore City, Maryland. The conservator was initially MSSIC, but MDIF was substituted shortly thereafter as its successor in interest and assumed all the assets and liabilities of MSSIC.

54. Defendant LCP Corporation ("LCP Corp.") is a Maryland corporation with its principal place of business in Baltimore, Maryland. Since September, 1982 LCP Corp. has owned all of the issued and outstanding stock of Old Court.

55. All of the issued and outstanding stock of LCP Corp. is owned by defendants Jeffrey A. Levitt (32½%), Allan H. Pearlstein (32½%), Jerome Cardin (18%) and Light Street Partnership (17%).

56. Light Street Partnership ("Light Street") is a Maryland general partnership owned equally by defendants Allan H. Pearlstein and Karol Levitt (the wife of defendant Jeffrey A. Levitt).

57. Defendant Jeffrey A. Levitt was President and Chief Operating Officer as well as a director of Old Court from the date of its acquisition by LCP Corp. (in which he was a

shareholder) until May 13, 1985. During this time period, he was also an officer, director, shareholder, partner or joint venturer in various Old Court subsidiaries and affiliates, some of which are identified in paragraphs 76 and 84(f) of this Complaint.

58. Defendant Jeffrey A. Levitt is a member of the Bar of the State of Maryland, although at some time prior to his acquisition of his ownership interest in Old Court his license to practice law was suspended by the disciplinary authorities of the Bar of the State of Maryland.

59. From sometime in 1975 until September, 1982 when LCP Corp. purchased the stock of Old Court, Defendant Jeffrey A. Levitt was a director and general counsel of First Progressive Savings and Loan, Inc. ("First Progressive") a Maryland mutual savings and loan association. Plaintiffs allege on information and belief that he used money belonging to First Progressive to buy his interest in Old Court.

60. For the period September, 1982 through May 13, 1985, the individual defendants named below were designated and served as directors and/or officers of Old Court ("Old Court Directors").

Name	Position
Jeffrey A. Levitt	Director and President
Allen Feinberg	Director and Secretary
David Uhlfelder	Director
Robert D. Pearlstein	Director and Treasurer
Samuel Shoubin	Director
Dennis E. Guidice	Director and Executive Vice-President

61. Defendant Karol Levitt is the wife of defendant Jeffrey A. Levitt. In addition to her interests in LCP Corp. and Light Street, she was an officer, director, partner, joint venturer, or shareholder of various Old Court subsidiaries and affiliates some of which are identified in later paragraphs of this Complaint. She also had ownership interests in various entities which she and Jeffrey A. Levitt used to divert from Old Court funds for their own personal use and those of other members of their family and

the other defendants including, in particular, defendants Allan H. Pearlstein and Rosemary Pearlstein. She also received funds and fees directly from Old Court for which she performed no services.

62. When defendant Jeffrey Levitt resigned as a director of First Progressive (September, 1982), defendant Karol Levitt was appointed a director and secretary of First Progressive.

63. Defendant Allan H. Pearlstein was as previously alleged a controlling shareholder of LCP Corp. directly and through Light Street. Although not formally titled an officer or director of Old Court, defendant Allan H. Pearlstein, as well as defendants Jerome Cardin and Karol Levitt, acted as such by, *inter alia*, appointing as directors their nominees defendants Robert D. Pearlstein (Allan H. Pearlstein's son) and defendant Samuel Shoubin (Jerome Cardin's father-in-law); controlling Old Court by virtue of their ownership interest in LCP Corp. (Allan H. Pearlstein and Jerome Cardin) and Light Street (Allan H. Pearlstein and Karol Levitt); and otherwise participating and directing the affairs of Old Court through various joint ventures, partnerships, corporations, subsidiaries and other affiliates some of which are identified elsewhere in this Complaint, and with respect to Cardin through his law firm, Cardin and Cardin, P.A. Defendant Jerome Cardin, or a representative of Cardin and Cardin, P.A., attended all Old Court Board of Director meetings.

64. Defendant Rosemary Pearlstein is Allan H. Pearlstein's wife and together with him participated in various acts related to his self-dealing with Old Court through various joint ventures, partnerships, corporations, subsidiaries and other affiliates. Rosemary Pearlstein also received monies in the form of excessive fees or other payments unrelated to or inconsistent with any services she performed for Old Court.

65. Defendants Jeffrey Levitt and Allan Pearlstein controlled and operated First Progressive prior to the purchase of Old Court by LCP Corp. and directly or indirectly thereafter until it was merged into Old Court on November 1, 1984, at the urging of the MSSIC defendants. Defendant Allan H. Pearlstein was the President of First Progressive.

66. Defendant Jerome Cardin is a member of the Bar of the State of Maryland. He was one of the original directors of Old Court when it was incorporated in 1960. From 1960 through September, 1982 he was co-general manager of Old Court, and from 1960 through May 13, 1985 he, individually or through his law firm, Cardin and Cardin, P.A. (and its predecessor Cardin and Weinstein), was general counsel for Old Court, its subsidiaries and many of its affiliates.

67. Cardin and Cardin, P.A. is a Maryland corporation engaged in the business of operating a law firm. Its principal place of business is located at 6615 Reisterstown Road, Baltimore, Maryland 21215. As stated in paragraph 46 above it or its predecessor, Cardin and Weinstein, were general counsel for Old Court, its subsidiaries and many of its affiliates from its inception through May 13, 1985. Plaintiffs allege on information and belief that Cardin and Cardin, P.A. received excessive and improper fees from Old Court

68. Prior to September, 1982 Jerome Cardin and members of his family, including a former judge of the Circuit Court for the City of Baltimore, were the sole owners of Old Court. They collectively sold the controlling interest in Old Court to LCP Corp.

69. Defendant Glass and Associates, P.A. is a Maryland corporation engaged in the business of operating a certified public accounting firm. Its principal place of business is located at 2 Hopkins Plaza, 714 Mercantile Bank & Trust Building, Baltimore, Maryland 21201. The firm was engaged by Old Court to perform accounting and auditing functions after September, 1982 and plaintiffs allege that they did perform such services until sometime in 1984 or 1985. Plaintiffs allege on information and belief that Glass and Associates reviewed the books and records of Old Court periodically and assisted in the preparation, either directly or indirectly, of unaudited statements of Old Court distributed to prospective purchasers of Old Court Certificates of Deposit, and that it prepared an audited year end statement for Old Court for 1983 and possibly 1984.

70. Defendants Jeffrey A. Levitt, Allan H. Pearlstein, Jerome Cardin, Karol Levitt, the other officers and directors of Old Court, Light Street and LCP Corp. were controlling

persons of Old Court within the meaning of Section 20 of the Exchange Act, 15 U.S.C. §78t(a). They will be referred to collectively along with Old Court, Rosemary Pearlstein, Cardin & Cardin and Glass & Associates as the "Old Court Defendants."

71. Defendant Maryland Savings Share Insurance Corporation ("MSSIC") is a Maryland Corporation chartered in 1962 in order to protect depositors and investors with accounts in Maryland savings and loan institutions which were not federally insured. The institutions which MSSIC purported to insure, of which there were approximately 100 during the period 1982 through May, 1985 (one of which was Old Court), were members of MSSIC and together controlled it by their right to elect eight of the eleven members of the Board of Directors (the other three were appointed by the Governor of Maryland). MSSIC stated orally and in writing in response to inquiries and to the general public on a continuing basis that it insured up to $100,000.00 each account of any kind on deposit with any member. First Progressive was a MSSIC member.

72. The individual defendants identified below, (along with MSSIC, collectively referred to as the "MSSIC Defendants"), constituted the Board of Directors and executive officers of MSSIC, at times relevant to this action. Many of these defendants had been officers or directors of Maryland Savings and Loan institutions.

Charles C. Hogg, II – President and Chief Operating Officer
Paul B. Trice, Jr. – Senior Vice President
George W. H. Pierson – Chairman of the Board of Directors
Jerome F. Dolivka – Vice Chairman of the Board of Directors
Frances F. Anderson – Director and Treasurer
Michael J. Dietz – Director and Secretary
Leonard Bass – Director
John C. Donohue, Sr. – Director
Henry R. Elsnic – Director

John D. Faulkner, Jr. – Director
James D. Laudeman, Jr. – Director
Terry L. Neifeld – Director

73. The State of Maryland Deposit Insurance Fund Corporation ("MDIF") is a Maryland Corporation created by the Maryland General Assembly on or about May 18, 1985 in emergency legislation. (Chapter 6 of the Special Session of 1985.) Its principal place of business is located at 114 E. Lexington Street, Baltimore, Maryland 21202. Effective June 1, 1985, it became the successor in interest to MSSIC, having assumed all of MSSIC's assets and liabilities, and agreed to pay up to $100,000 per account frozen at Old Court. MDIF was the conservator for Old Court until November 8, 1985 at which time it became the receiver.

74. Venable, Baetjer & Howard ("VB&H") is a Partnership engaged in the practice of law which has its principal place of business in Baltimore, Maryland. From 1974 until late 1985, VB&H served as general counsel to MSSIC. During that time period, a lawyer from VB&H attended virtually every meeting of the board of directors of MSSIC.

75. Defendants Jeffrey A. Levitt, Allan H. Pearlstein, Jerome Cardin and Karol Levitt purchased Old Court through LCP Corp. with the purpose and extent of using it to raise large amounts of capital to dispose of and invest for their own personal benefit, without regard to applicable law and banking regulations designed to protect owners of investment certificates and depositors in all accounts at Old Court; and did so, individually and collectively among themselves and in concert with others, including the other Old Court Defendants, Glass & Associates, Cardin & Cardin, the MSSIC defendants and various officials of the Division of Savings and Loans of the Maryland Department of Licensing and other Governmental Entities identified in paragraph 69 of the Complaint.

76. In order to implement the scheme to divert funds belonging to Old Court into personal or business enterprises, defendants Jeffrey Levitt, Allan Pearlstein, Karol Levitt, with the assistance of the other Old Court directors, used existing

subsidiaries and affiliates of Old Court and created others with interlocking officers and directors including but not limited to: Old Court Joint Ventures, Inc., Old Court Investment Company, Inc., Monumental City Service Corporation; The Insurance Group, Inc. (formerly "Old Court Insurance Group, Inc."), Magill Herman, Inc., Intermarket, Inc., Meridian Mortgage Investment Corp.; Bankers' Realty, Inc., and Bankers' Appraisal, Inc.

77. Defendants Feinberg and Guidice (Old Court directors and officers) participated in the above scheme as did officers or directors of some of the above entities, and received excessive and improper fees and payments from Old Court or one or more of the above subsidiaries and affiliates of Old Court or others related to or affiliated with Old Court, Jeffrey Levitt, Karol Levitt, and Allan Pearlstein.

78. One of the means by which the new owners of Old Court attempted to generate the cash for their investments, was to cause Old Court, shortly after its acquisition by LCP, to offer for sale and sell Certificates of Deposit at higher rates of interest than those being offered by competitive financial institutions.

79. Since the sale of Certificates of Deposit locally would not generate sufficient funds to finance the Old Court defendants' objectives, the Old Court defendants attempted to sell great numbers of such Certificates to persons or entities outside Maryland who would not ordinarily do business with Old Court and would not in all likelihood know of Old Court otherwise, in addition to promoting sales of such Certificates within Maryland.

80. In connection with their efforts to attract out of state purchasers of Old Court Certificates of Deposit, the Old Court Defendants instituted a massive national advertising campaign which utilized newspapers with national circulation as well as newspapers in other regional markets including, *inter alia,* the Wall Street Journal, the New York Times, the Philadelphia Inquirer, the Los Angeles Times, the Washington Post and the Chicago Tribune, in addition to the local Baltimore papers.

81. In addition, the Old Court Defendants initiated a campaign to utilize brokers and investment bankers to market

Certificates of Deposit, and succeeding in selling Certificates of Deposit through such brokers and investment bankers, including, but not limited to, First Investment Securities, Inc., a Little Rock, Arkansas brokerage firm.

82. In connection with their efforts to attract out of state buyers of Certificates of Deposit, Old Court utilized a toll free "800" number, prepared employees with information to respond favorably to out of state inquiries as to the safety and risk-free nature of Old Court Certificates of Deposit, arranged with the MSSIC defendants as well as personnel at Governmental Entities (defined in Paragraph 82 of this Complaint) to answer inquiries about Old Court positively and together with MSSIC prepared and distributed numerous letters, brochures and other materials emphasizing the risk free nature of all investments and deposits at Old Court based upon the representation that they were fully insured up to $100,000.

83. The advertisements placed by Old Court in various newspapers and the written material distributed directly to potential purchasers and the public were intended to and did in fact create the impression that the Old Court's Certificates of Deposit were "safe" investments, insured by a governmental agency in much the same way as were Certificates of Deposit from banks and savings and loan institutions insured by the Federal Deposit Insurance Corporation ("FDIC") and Federal Savings and Loan Insurance Corporation ("FSLIC".)

84. In connection with the Defendants' campaign to induce the investing public to purchase Old Court Certificates of Deposit, Old Court:

(a) Stated falsely that it had an "advantage" over other financial institutions in that it could pay a higher yield on its Certificates of Deposit than comparable institutions without risk of loss to purchasers of such investments while continuing to operate in accordance with sound banking practices, because Old Court was operated by experienced, knowledgeable and aggressive management;

(b) Utilized in its advertisements in newspapers, on stationary and elsewhere a seal similar to that of the State of

Maryland adopted by MSSIC intending thereby and through direct statements to prospective purchasers of Certificates of Deposit to mislead such purchasers into believing that their investments in Old Court were safely insured up to $100,000 per account by the State of Maryland or a Maryland governmental agency;

(c) Issued in response to inquiries from potential customers, especially prospective purchasers of Certificates of Deposit, financial statements purporting to set forth a true and accurate picture of the financial condition of Old Court, knowing such statements were incorrect;

(d) Distributed in response to inquiries about the safety of Old Court Certificates of Deposit from prospective purchasers, including plaintiffs Seymour Zuckerman, George R. Lyon and Francine Tafflin various materials in the form of brochures and letters, some of which were prepared by MSSIC and all of which contained false and misleading information; including, but not limited to: a brochure entitled "Old Court Savings & Loan, Inc. Statement of Financial Condition"; a brochure entitled "We Have the Answers"; and monthly letters on MSSIC stationary entitled "An Open Letter to a Potential MSSIC Saver" (all of which contain false and misleading information) which were intended to and had the effect of inducing investors to believe that the Old Court Certificates of Deposit were fully and safely insured by a governmental agency;

(e) Represented that its operations were at all times in compliance with the rules and regulations of the [illegible]cable regulatory agencies of Maryland, while knowing that it was a notorious violator of MSSIC regulations as well as state statutory law and regulations;

(f) Failed to disclose to potential purchasers of Certificates of Deposit that Old Court was lending significant sums of money to business enterprises belonging to or controlled by defendants Jeffrey A. Levitt and Allan H.

Pearlstein and/or their relatives, and associates, or other Old Court defendants, including, but not limited to Levitt-Pearlstein Investment Foundation; Levitt-Pearlstein Management Co.; Charles Street Title Co.; Karol Springs Partnerships I and II; Pearl Miami Partnerships; Bay Breeze Limited Partnership; and Ostot Enterprises, Inc.;

(g) Failed to disclose that certain of the Old Court Defendants attempted to obtain from Maryland governmental officials preferential treatment for various business enterprises belonging to or controlled by Jeffrey A. Levitt, Allan H. Pearlstein and their relatives and associates by lending money belonging to Old Court to such persons with the understanding that such "loans" not be repaid or could be repaid on preferential terms;

(h) Failed to disclose material facts as to the creation and use of numerous corporations, partnerships and joint ventures including, *inter alia*, those identified in paragraphs 75(f) and 68 of the Complaint, with complex and interlocking relationships among them and with Old Court which were controlled by one or more of the defendants Jeffrey A. Levitt, Allan H. Pearlstein, Jerome Cardin, Karol Levitt, Rosemary Pearlstein, Allen Feinberg, Dennis E. Guidice, Samuel Shoubin, Robert D. Pearlstein and others to act as conduits to enable some or all of the individual Old Court defendants, relatives, friends and associated unnamed parties in obtaining money belonging to Old Court for their own personal gain.

(i) Failed to disclose that First Progressive was in effect operated and controlled by defendants Jeffrey A. Levitt and Allan J. Pearlstein (even prior to its merger with Old Court) and that First Progressive was in serious financial difficulties because of, *inter alia*, mismanagement and misappropriation of funds by defendants Jeffrey A. Levitt and/or Allan H. Pearlstein or other related individuals.

85. All of the Old Court defendants, as officers, directors and shareholders of Old Court or otherwise in their respective

capacities, knew that the information prepared, published and circulated to potential and current investors as well as to the public at-large was false and misleading and failed to state facts necessary to avoid the misleading nature of such representations and that such material misleading information was intended to induce investors to rely upon it in connection with their purchases of Old Court Certificates of Deposit.

86. The MSSIC defendants knew of Old Court's aforementioned acts, misrepresentations and omissions to disclose material information regarding its operations generally and in connection with the offer and sale of Certificates of Deposit by Old Court, and explicitly and implicitly aided, abetted and consented to the unlawful practices of the Old Court defendants and the material misrepresentations and failures to disclose information necessary to avoid the misleading nature of these and other representations in connection with the sale of Old Court Certificates of Deposit.

87. The MSSIC defendants alone and in concert with the Old Court defendants, other Maryland savings and loan institutions, officials of Maryland's Department of Licensing, Saving and Loan Division, and other unnamed parties artificially inflated the attractiveness of Old Court's Certificates of Deposit (and those of other Maryland savings and loan institutions) in order to induce investors to purchase Old Court Certificates of Deposit as well as similar certificates of deposit sold by other member savings and loan institutions in the follcwing ways:

(a) Prepared, published, distributed and made available for distribution by member savings and loan association a brochure entitled "We Have the Answers" creating the impression it was a Maryland state agency responsible for the regulation of over one hundred savings and loan institutions in Maryland, and that, in fact, it regulated such savings and loans to insure the safety of deposits and investments in them;

(b) Prepared, published, distributed and made available for distribution by member savings and loan institutions, on a regular basis, letters entitled "An Open Letter to

a Potential MSSIC Saver" which were given to prospective purchasers of Certificates of Deposit, intending to and in effect creating the impression that it regulated all of its 101 members savings and loan institutions in essentially the same manner as the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation did for the banks and savings and loans insured by them;

(c) Responded to telephone and written inquiries by prospective purchasers of Certificates of Deposit by assuring them of the safety of their investment in member savings and loan associations;

(d) Permitted member savings and loan associations to advertise the sale of Certificates of Deposit in national and regional newspapers including the Philadelphia Inquirer, the Wall Street Journal, the New York Times, the Los Angeles Times, the Washington Post, and the Baltimore Evening Sun using a seal similar to that of the State of Maryland and otherwise creating by words and pictures the image that such institutions were operated by and insured by governmental agencies of or the State of Maryland itself;

(e) Pursued an explicit policy of concealing adverse information concerning its member savings and loan institutions and, in particular, Old Court, in order to prevent its publication by newspapers and electronic media; and

(f) Opposed legislation introduced in the Maryland legislature that would have required MSSIC to expressly state, as was true, that it was not backed by the full faith and credit of the State of Maryland.

88. Commencing at some time after the purchase of Old Court by LCP Corp. and continuing virtually until the collapse of Old Court, during which time plaintiffs and members of the class were purchasing and renewing Old Court Certificates of

Deposit, the MSSIC defendants, contrary to their representations to plaintiffs and members of the class, knew that Old Court Certificates of Deposit were not "safe" investments because, *inter alia*,

(a) Old Court was being systematically looted by several of the Old Court Defendants in that they were diverting substantial funds of Old Court for their own use;

(b) Old Court was a "habitual violator" of MSSIC's rules and regulations;

(c) Old Court was systematically paying exorbitant management, consulting, and similar fees to several of the Old Court defendants and other associated entities or persons;

(d) Old Court was during the same period systematically allowing the Old Court defendants and members of their families to overdraw in huge amounts on NOW accounts at Old Court, as well as making insider loans in amounts prohibited by MSSIC and state regulations;

(e) Old Court was being used by the Old Court defendants as a captive savings and loan to generate large amounts of cash to be used to finance large real estate and other projects in which they and related persons and business entities had interests. These large real estate investments were individually illegal, improper and imprudent and taken together absorbed an excessive amount of Old Court's total capital;

(f) The proportion of assets of Old Court utilized in making commercial construction and unimproved land loans was 69.83% on March 31, 1985. This effectively placed Old Court in an extremely risky financial posture. Under MSSIC rules and regulations, the maximum proportion of assets to be so used was 40%. Even before March 31, 1985, it exceeded the MSSIC guidelines and prudent banking standards;

(g) The extremely high proportion of Old Court assets devoted to such loans was even riskier than readily apparent since, as certain of the Old Court, defendants knew and in fact planned, a large number of such loans had been made to entities affiliated in some manner with one or more of the Old Court defendants.

(h) Many of the Old Court loans described in paragraph (f) above as well as many of the loans generally made by Old Court, particularly those made to Old Court defendants or related entities, were made with inadequate documentation and collateral or even completely without documentation and/or collateral.

(i) Other deficient, risky, and fraudulent lending practices included refinancing of delinquent loans with further loans, and issuance of mortgage loans in amounts larger than 80% of the sale price of the underlying realty;

(j) On November 1, 1984, at the urging of MSSIC, First Progressive was merged into Old Court, despite the fact that the MSSIC defendants knew that First Progressive was operating at a substantial loss and was operating in violation of MSSIC regulations as well as those of the Division of Savings and Loans and that Old Court itself was, as alleged previously in this complaint, operating in violation of these same rules and regulations. The MSSIC defendants were also aware that First Progressive was at that time and for sometime prior thereto controlled and operated by defendants Jeffrey A. Levitt and Allan H. Pearlstein and that the poor financial condition and mismanagement of First Progressive was at least in part a result of unlawful acts of defendants Jeffrey A. Levitt, Allan H. Pearlstein and Karol Levitt.

89. In March, 1985, at the same time that the aforementioned brochures and letters were being circulated to prospective investors, MSSIC sent a letter to Jeffrey Levitt, Old Court's President, specifying in detail over fifteen separate and serious violations of MSSIC rules and regulations by Old Court.

90. The MSSIC defendants concealed from and deliberately misrepresented to the investing public the nature of the "insurance" offered by MSSIC in, *inter alia*, the following ways:

(a) MSSIC asserted that the "insurance" consisted of an undertaking by MSSIC to back up each of the accounts in all of its 101 member savings and loan institutions, but in fact, the MSSIC defendants knew that such an undertaking would be impossible in the event of a "run" on savings and loans like that experienced in several states in the recent past because it had insufficient liquid assets to do. A significant portion of its assets were securities from member institutions which could not be converted to cash readily; or

(b) MSSIC asserted, contrary to fact (according to MDIF and MSSIC regulations), that in the event that an insured member was unable to pay any depositor with any type account including Certificates of Deposit, upon demand and in accordance with the terms under which such deposits were made or such certificates were sold, MSSIC would promptly assume such obligation and honor it under the same terms and conditions agreed to between the member savings and loan institutions and depositors or owners of certificates of deposit. This assertion was made to all purchasers of Certificates of Deposit, including the named plaintiffs Francine Tafflin, Seymour Zuckerman and George R. Lyon in various ways including:

(i) A statement as to what MSSIC did in a situation in 1964 involving a member institution in financial trouble;

(ii) Describing MSSIC insurance as the equivalent or FSLIC and FDIC insurance; and

(iii) Representing itself as a governmental agency.

(c) MSSIC misrepresented the number of problems which it had encountered since its formation by citing only one such situation, when in fact there were other problems

including those at First Progressive in which they were deeply involved.

(d) MSSIC never supervised or regulated its members in the manner it was obligated to do by its charter, by-laws and regulations.

91. VB&H has since at least as early as 1974 represented various saving and loan associations which were members of MSSIC, or the owners, directors, officers or agents of such associations including, but not limited to, Cardin, Jeffrey Levitt, Old Court, and Allan Pearlstein, while at the same time serving as counsel to MSSIC. In addition, VB&H has served as counsel to several partnerships or other business entities in which one or more of the above named individuals were involved, and one or more partners of VB&H participated as a principal in one or more businesses in which certain Old Court defendants were also principals.

92. VB&H was at all times aware that its legal services for MSSIC would cause MSSIC to take actions which would be relied upon by persons purchasing certificates of deposit from Old Court, First Progressive and other member savings and loan associations. In representing MSSIC, VB&H owed a duty to depositors and purchasers of certificates of deposit from MSSIC member savings and loan associations, which duty it failed to perform because of conflicts of interest arising from its representation of Old Court; various Old Court defendants and other firm clients associated with other members of MSSIC.

93. As a result of its representation of the above referenced parties, VB&H was not properly carrying out its duties as independent counsel to MSSIC on matters in which MSSIC's actions might infringe upon the interests of their other clients.

94. At least in part because of their conflict of interest VB&H participated with and aided and abetted the Old Court Defendants and the MSSIC Defendants in carrying out the aforementioned scheme and frauds. In advising MSSIC's Board of Directors, whose members included representatives of the present or former clients, VB&H aided the MSSIC Defendants and the Old Court Defendants in concealing the problems which

existed at Old Court and MSSIC. Among the various actions which were taken knowingly and/or recklessly by VB&H were:

(a) Advising MSSIC that it could advertise that accounts of its member institutions were insured up to $100,000 per account, regardless of the number of accounts opened by a particular investor, whereas MSSIC was not authorized to do so, nor did it have adequate funds to insure repayment of investors on that basis;

(b) Advising MSSIC to attempt to defeat legislation which would require MSSIC members to disclose that MSSIC was not a state agency;

(c) Advising MSSIC to ignore flagrant violations of its own regulations and those of the Division of Savings & Loan of the Maryland Department of Licensing by members and in particular Old Court, and its predecessor First Progressive;

(d) Failing to advise MSSIC of the numerous violations by the Old Court Defendants of state and federal securities laws enumerated herein; and

(e) Knowing that MSSIC's own conduct constituted a violation of state and federal securities laws and that it had an affirmative duty to cease such conduct, but failing to advise MSSIC of those violations or of its duty.

95. VB&H received fees for representing some or all of the Old Court Defendants in an amount in excess of $295,000.

96. Three Maryland Governmental agencies charged with regulating savings and loan institutions in Maryland, the Department of Licensing and Inspection, the Board of Savings and Loan Association Commissioners and the Division of Savings and Loan Association ("Governmental Entities") acting alone, in concert with each other and in concert with MSSIC failed to regulate Maryland savings and loan institutions and actively hid from the investing public and plaintiffs the adverse information they knew about the financial condition, violation of MSSIC

rules and regulations as well as those of the responsible governmental entities, the unlawful self dealing and other improper practices of Old Court and other savings and loan institutions. One flagrant example of this lack of compliance with laws and regulations was the failure to find and disclose year end audited statements for Old Court fiscal years 1983 and 1984.

97. A number of individual officials with responsibility for the operations of these Governmental Entities had long standing relations with the savings and loan industry, and with the MSSIC defendants (who also had past ties with member savings and loans) and intentionally concealed information adverse to various savings and loan institutions for fear the disclosure of adverse information would damage the owners of such institutions, especially Old Court.

98. The Governmental Entities and MSSIC were convinced that revelations of any adverse information regarding the savings and loan industry could result in a loss of public confidence in the savings and loan system, a decrease in deposits and investments and perhaps even cause a "run", resulting in criticism or liquidation of MSSIC and the governmental entities. Contrary to their duties and public representations, the Governmental Entities, MSSIC, and the MSSIC Defendants adopted explicit policies of hiding their knowledge of the poor financial condition of several savings and loan institutions and of their serious violation of its regulations and sound banking practices.

99. As was inevitable and as known by the defendants to be inevitable, a run did in fact take place on Old Court and Old Court was unable to meet the demands for withdrawals by its customers.

100. On May 13, 1985, Old Court was placed into conservatorship in the Circuit Court for Baltimore City, Maryland (hereinafter "Conservatorship Proceeding"). MSSIC was appointed the Conservator.

101. On or about June 1, 1985, the Maryland General Assembly established the Maryland Deposit Insurance Fund Corporation ("MDIF"), as the successor in interest of MSSIC, and MDIF was substituted as the Conservator for Old Court.

MDIF assumed all of the assets and all of the liabilities of MSSIC, including all of its insurance liabilities.

102. On or about May 13, 1985, the Circuit Court for Baltimore City, by order in the Conservatorship Proceeding, *inter alia*, limited withdrawals from all accounts for all deposits at Old Court (including Certificates of Deposit) made prior to May 13, 1985 to no more than $1,000 for each consecutive thirty day period.

103. On or about June 7, 1985, the Circuit Court for Baltimore City, by order in the Conservatorship Proceedings, prohibited all withdrawals from all accounts (including Certificates of Deposit) at Old Court of funds deposited prior to May 13, 1985 for a period of ninety days subsequent to the date of said Order (hereinafter "June 7, 1985 Order").

104. The June 7, 1985 Order, *inter alia*, allowed Certificates of Deposit to accrue interest at the rate contracted for when opened until the date of maturity of such certificates at which time (if within the ninety-day period of the June 7, 1985 Order) the Investment Certificate would be rolled-over automatically into successive thirty day Certificates of Deposit accruing interest at 5½ per cent.

105. On or about June 27, 1985, the Circuit Court of Baltimore County by order in the Conservatorship Proceeding continued to preclude all withdrawals of funds deposited in all accounts (including Certificates of Deposit) at Old Court prior to May 12, 1985, subject to an exception that funds could be withdrawn for the purpose of making monthly or other periodic payments on any debt owed to Old Court.

106. Subsequent to the June 27 Order, and until October 28, 1985 further orders or actions in the Conservatorship Proceeding prohibited withdrawals of deposits made prior to May 13, 1985 which again included Certificates of Deposit. On October 28, 1985 by Order of the Court in the Conservatorship Proceedings certain hardship exemptions were promulgated which allowed withdrawal from certain accounts on a very limited basis. None of the named plaintiffs have obtained any funds on this basis, and plaintiffs allege on information and belief

that such a strict construction of the "exemptions" has made it virtually meaningless.

107. On or about November 8, 1985, the Circuit Court for Baltimore City converted the Old Court Conservatorship Proceeding into a Receivership Proceeding. MDIF was appointed the Receiver.

108. Upon conversion of the Conservatorship Proceeding into a Receivership Proceeding, the Circuit Court for Baltimore City prohibited (a) the accrual of all subsequent interest due on Certificates of Deposit and (b) required that Certificates of Deposit which matured as of that date or subsequent thereto be rolled over into accounts upon which no interest was payable.

109. On January 3, 1986, defendant Jeffrey A. Levitt was indicted by a state grand jury on criminal charges of embezzling and misappropriating $14.6 million from Old Court and First Progressive. The indictment contains 12 felony embezzlement counts and 13 misdemeanor charges of misappropriation by a fiduciary. One count of the indictment alleges that Levitt got the money to buy his stake in Old Court by stealing from First Progressive.

110. The Attorney General for the State of Maryland has announced that he intends to seek indictments about other individuals involved in the Old Court/First Progressive fraud in the near future.

111. A joint federal and state investigation into possible criminal acts by persons involved with Old Court has been taking place for the last several months.

112. As a result of the collapse of Old Court and its failure and/or inability to pay to plaintiffs the amounts invested by them in Old Court Certificates of Deposit, the plaintiffs have been damaged and continue to be damaged despite the fact that at some indeterminate time in the future MDIF and/or some other entity may pay to them some portion or all of the principal the invested in Old Court.

113. As a result of defendants' unlawful actions as alleged herein, the named plaintiffs and members of the class have been injured and will continue to be injured at an accelerated rate in that as of November 8, 1985 no interest whatsoever is being

accrued on Old Court Certificates of Deposit, and that since May 13, 1985 interest on Old Court Certificates of Deposit which matured as of that date but prior to November 8, 1985 was being accrued at the rate of 5½%, rather than the interest rates which Old Court was obligated to pay on such Certificates of Deposit pursuant to the terms and conditions of their sale.

114. Although officials of the State of Maryland and MDIF have stated that they will guarantee repayment on Certificates of Deposit up to $100,000 per account, and MDIF specifically assumed all the assets and liabilities of MSSIC , MDIF has told owners of Certificates of Deposit that they would not be compensated for any interest which would accrue after November 8, 1985 or the difference between the interest rate which such Certificates bear and the 5½% interest rate which has been accrued on Certificates of Deposit which matured between May 13, 1985 and November 8, 1985.

115. Despite the fact that MDIF purportedly assumed all of the assets and liabilities of MSSIC, which include the obligations of MSSIC to repay immediately losses incurred by depositors and Certificate owners of savings and loans insured by MSSIC, MDIF has stated that no distribution of funds will be made to any owners of Certificates of Deposit before liquidation of the assets of Old Court, and before obligations to creditors of Old Court and depositors of Old Court with accounts other than Certificates of Deposit were satisfied. MDIF's representatives have also stated to owners of Old Court Certificates of Deposit, including the named plaintiff George R. Lyon, that repayment on Old Court Certificates of Deposit could take anywhere between two and eighteen years.

116. Regardless of an eventual repayment of monies owed to the named plaintiffs and members of the class defined herein by MDIF or some other governmental agency or the State of Maryland, these plaintiffs have already suffered damage inasmuch as they have been deprived of the use of their money when they were entitled to it and will in all probability be deprived of this money for a significant time in the future. No state agency or other party has offered to pay damages based

upon the present worth of funds due to plaintiffs and their future worth at some unknown date.

117. Plaintiffs have invested substantial amounts of their savings and funds in Old Court Certificates of Deposit and have thus suffered consequential damages and will continue to do so at an accelerated rate inasmuch as plaintiffs had relied upon the use of these funds to fulfill personal and business commitments and in many cases to maintain their present standards of living.

118. The class as defined at paragraph 1 of this Complaint is in compliance with Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure because:

(a) Because of the great number of investors in Old Court, the members of the Class are so numerous that joinder of all members is impracticable.

(b) The claims of plaintiffs are typical of the claims of all members of the Class and their common interest is to obtain relief for themselves and the Class for the violations of law set forth herein.

(i) All of the class members have received virtually the same information in virtually the same form from Old Court and MSSIC and relied upon such information in much the same way;

(ii) Defendants' wrongful conduct as alleged in this Complaint has the same relevance to all claims by members of the class. Such conduct includes, in addition to the said misrepresentations to plaintiffs, the Old Court Defendants' theft of Old Court's assets for their personal use; the failure of MSSIC to regulate Old Court in accordance with its obligations; and the knowledge by MSSIC and failure to disclose it of Old Court violations of the rules of MSSIC and state regulatory agencies;

(iii) The Certificates of Deposit which form the basis for the claims alleged herein are virtually the same;

(iv) The conduct of MDIF toward all owners of Certificates of Deposit since the collapse of Old Court is the same as to all plaintiffs;

(v) Most damages suffered by plaintiffs can be calculated on the same basis because of the actions of MDIF and the orders of the Circuit Court for Baltimore City entered during the period of conservatorship and receivership of Old Court.

(c) Plaintiffs will fairly and adequately protect the interests of the Class and have retained competent counsel experienced in class action litigation to prosecute this action.

(d) A class action is superior to other available methods for the fair and efficient adjudication of this controversy since the Class is so numerous and its membership so widespread that joinder of all members is impracticable. There will be no difficulty in the management of this action as a class action since records of plaintiffs' Certificate Accounts are easily available from Old Court or its Receiver MDIF.

(e) Questions of law and fact common to the members of the Class exist and predominate over any questions affecting only individual members of the Class. Among the questions of law and fact common to the Class are:

(i) Whether the federal and state securities laws, common law and RICO were violated by defendants' acts and omissions as alleged herein;

(ii) whether defendants participated in and pursued the conspiracy and common course of conduct of which plaintiffs complain;

(iii) whether documents, releases, reports, and statements disseminated to the investing public during the class period omitted and/or misrepresented material facts about the businesses and financial conditions of Old Court and MSSIC;

(iv) whether the defendants acted wilfully or recklessly in omitting to state and/or misrepresenting material facts or in aiding and abetting the making of such misstatements;

(v) whether during the class period the attractiveness of Old Court Investment Certificate was artificially inflated due to the non-disclosures and/or misrepresentations complained of herein;

(vi) whether plaintiffs' funds have been unlawfully converted by MDIF or others; and

(vii) whether MDIF or the State of Maryland is obligated to pay plaintiffs' damages which include full restitution of their principal and agreed upon interest rate for the full period of time they have been deprived of their investments.

COUNT I

Violation of Section 10(b) of the Exchange Act and Rule 10b-5 by All Old Court Defendants and All MSSIC Defendants and VB&H

119. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 118.

120. During the period from November 1982 to May 13, 1985, defendants, singularly and in concert with each other and other unnamed parties engaged in or aided and abetted a plan, scheme and unlawful conspiracy and course of conduct, pursuant to which they knowingly or recklessly engaged in acts, transactions, practices, and courses of conduct which operated as a fraud upon plaintiffs and the Class, and made various untrue statements of material facts and omitted to state material facts in order to make the statements made, in light of the circumstances under which they were made, not misleading, to plaintiffs and the Class in connection with the sale of Old Court Certificates of Deposit to plaintiffs and the Class.

121. During the period from November 1982 to May 13, 1985, defendants, pursuant to such plan, scheme and unlawful

conspiracy and course of conduct, knowingly or recklessly issued, caused to be issued, participated in the issuance of, or aided and abetted the preparation and issuance of the above referenced documents, including, but not limited to Old Court financial statements, as well as brochures and letters prepared by Old Court or MSSIC which contained the above reference misstatements of material fact or omitted to state the material facts.

122. The misstatements and omissions, taken individually and as a whole, were designed to and did create the false impression that the prospects for Old Court were bright; that it had developed operating techniques that were sound, prudent, and gave it a competitive edge in the savings and loan industry; that its loans were adequately collateralized and/or guaranteed by reputable, financially responsible borrowers; that it was profitable; that its profitability would continue to grow; that MSSIC was financially sound, that the insurance offered by MSSIC was completely reliable, and that an investment in Old Court would be safe.

123. Defendants had actual knowledge of at least some of the materially false and misleading statements and omissions set forth herein.

124. Plaintiffs, relying on the said misrepresentations and omissions, and not knowing they were false, invested in Old Court Certificates of Deposit and sustained damages thereby.

125. Each of the defendants, in acting as hereinabove described, did so knowing that the insurance purportedly provided by MSSIC and advertised by Old Court and other saving & loan institutions in connection with the sale by Old Court of Certificates of Deposit by Old Court and other Maryland savings and loan associations was not what it was purported to be; that the true financial and operating condition of Old Court and MSSIC were poor; that the risks of loss from and the losses sustained or likely to be sustained from its poor banking practices were high; and of the falsity of the other misrepresentations and omissions alleged herein. With knowledge or reckless disregard of the facts as alleged herein, defendants disseminated or participated in the dissemination of

the reports and statements referred to above knowing that they contained misstatements of or omitted to contain the material fact alleged herein.

126. By virtue of the foregoing, defendants have violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, and are liable thereunder to plaintiffs.

127. Each of the defendants is liable as a direct participant in, as a co-conspirator and/or as an aider and abettor, of the wrongs complained of herein.

128. The Old Court directors, defendants Allan H. Pearlstein, Karol Levitt, Jerome Cardin, LCP Corporation and Light Street are liable to plaintiffs as controlling persons of Old Court.

129. MDIF is liable to plaintiffs on this claim as the successor in interest to MSSIC and as the receiver of Old Court.

COUNT II

Violation of the Racketeer Influenced and Corrupt Organization Act By Old Court Defendants and VB&H

130. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 129.

131. The Old Court defendants and VB&H were at all times relevant to the events alleged herein all either employed by or associated with an enterprise engaged in, or the activities of which affected, interstate commerce. That enterprise is an association in fact comprised of Old Court and the Old Court defendants, and Glass & Associates, and numerous other known and unknown persons and entities associated with one or more of the Old Court defendants and who were the recipients directly or indirectly of illegal or improper loans or payments from Old Court, including, but not limited to, the subsidiaries and affiliates of Old Court, Jeffrey A. Levitt, and Allan H. Pearlstein identified previously in this complaint.

132. In violation of 18 U.S.C. §§1962(c) and (d), defendants have conspired to conduct and have conducted or participated in the conduct of, directly or indirectly, the affairs of the enterprise

identified in paragraph 127 above through a pattern of racketeering activity consisting of repeated acts of fraud in the sale of securities, as alleged in this complaint; repeated acts of theft and embezzlement as alleged herein and by the indictment referred to above and repeated acts of mail and wire fraud violative of 18 U.S.C. §§1341 and 1343 all of which occurred within 10 years of one another, including:

(a) Mailings of the above referenced brochures, letters and financial statements to prospective customers, and

(b) Mailings or wiring by investors of funds to be invested in Old Court induced by the misrepresentations and fraud of defendants including, but not limited to, the mailing of the funds invested by the named plaintiffs to Old Court.

133. Each of the Old Court defendants' and VB&H's racketeering activities, as set forth herein, were conducted for the purpose of furthering the enterprise's scheme of defrauding investors. Each such act had similar purposes, involved similar participants, namely the defendants, similar methods of commission and similar results impacting the same victims, namely, members of the Class. Thus, such acts constitute a pattern of racketeering activity within the meaning of the Racketeer Influenced and Corrupt Organizations Act.

134. Each of the defendants agreed and conspired with other defendants and/or other unnamed partners to commit the above specified acts of racketeering activity, and agreed and conspired to conduct the affairs of the above identified enterprise through a pattern of racketeering activity.

135. By reason of defendants' violations of 18 U.S.C. §§1962(c) and (d) as alleged herein, the members of the Class have been injured in their business and property in that (a) they each invested substantial sums of money in Old Court; and (b) they each have suffered losses as a result of those investments.

136. MDIF is liable to the plaintiffs on this claim as the receiver of Old Court.

COUNT III

Violation of the Racketeer Influenced and Corrupt Organization Act by the MSSIC Defendants and VB&H

137. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 136.

138. The MSSIC defendants and VB&H were at all times relevant to the events alleged herein in either employed by or associated with an enterprise engaged in, or the activities of which affected, interstate commerce. That enterprise is an association in fact comprised of MSSIC, all of its member savings and loan associations, and the Governmental Entities.

139. In violation of 18 U.S.C. §§1962(c) and (d), the MSSIC defendants have conspired to conduct and have conducted or participated in the conduct of, directly or indirectly, the affairs of the enterprise identified in paragraph 133 above through a pattern of racketeering activity consisting of repeated acts of fraud in the sale of securities, as alleged in this Complaint; and repeated acts of mail and wire fraud violative of 18 U.S.C. §§1341 and 1343 all of which occurred within 10 years of one another, including:

(a) Mailings of the above referenced brochures, letters and financial statements to prospective customers, and

(b) Mailings or wiring by investors of funds to be invested in Old Court.

140. Each of the MSSIC defendants' and VB&H's racketeering activities, as set forth herein, was conducted for the purpose of furthering the enterprise's scheme of defrauding investors to continue to invest in Old Court and other Maryland savings and loan associations in order to avoid criticism of themselves and MSSIC and liquidation of MSSIC. Each such act had similar purposes, involved similar participants, namely the MSSIC defendants, similar methods of commission and similar results impacting the same victim, namely members of the Class. Thus, such acts constitute a pattern of racketeering

activity within the meaning of the Racketeer Influenced and Corrupt Organizations Act.

141. Each of the defendants agreed and conspired with other defendants and/or co-actors to commit the above specified acts of racketeering activity, and agreed and conspired to conduct the affairs of the above identified enterprises through a pattern of racketeering activity.

142. By reason of defendants' violations of 18 U.S.C. §§1962(c) and (d) as alleged herein, the Class has been injured in its business and property in that (a) they each invested substantial sums of money in Old Court; and (b) they each have suffered losses as a result of those investments.

143. MDIF is liable to plaintiffs on this claim as the successor in interest to MSSIC.

COUNT IV
Common Law Fraud, Deceit, Negligent and Intentional Misrepresentation By All Defendants

144. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 143.

145. The aforementioned misrepresentations and omissions were made by defendants intentionally knowing they were false, or in reckless disregard thereof, to artificially inflate the attractiveness of Old Court Certificates of Deposit, and to induce plaintiffs to invest in those Certificates of Deposit, with knowledge that the plaintiffs and class members were relying on defendants' misrepresentations and omissions.

146. Plaintiffs, relying on the said misrepresentations and omissions, and not knowing they were false, invested in Old Court Certificates of Deposit and sustained damages thereby.

147. By reason of the foregoing, defendants are guilty of common law fraud, deceit and intentional misrepresentations.

148. MDIF is liable to plaintiffs on this claim as the successor in interest to MSSIC and as the receiver of Old Court.

COUNT V
Violation of the Maryland Securities Act and other applicable state securities laws by All Old Court Defendants, All MSSIC Defendants and VB&H

149. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 148.

150. By virtue of the foregoing, defendants have violated section 11-301 of the Maryland Securities Act, Md. Corps. & Assn's Code Ann. §11-301, and other applicable state securities laws, including Mich. Comp. Laws §451.501; N.J. Rev. Stat. §49:3052; N.Y. Gen. Bus. Law §339-a; and 70 Pa. Stat. Ann. §1-401.

151. This Count is brought by all named defendants and putative class members for violation of the Maryland law. In addition, it is brought by the named plaintiffs who are citizens of the states listed other than Maryland under the statutes of such state on their own behalf and and on behalf class members who are citizens of such state.,

152. MDIF is liable to plaintiffs on this claim as the successor in interest to MSSIC and as the receiver of Old Court.

COUNT VI
Breach of Contract by Old Court

153. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 152.

154. Old Court's failure to pay to its investors the sums invested by them in Old Court Certificates of Deposit constitutes a breach of the contracts between Old Court and each of the plaintiffs.

155. MDIF is liable on this claim as the receiver of Old Court.

COUNT VII
Breach of Contract by MSSIC

156. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 155.

157. Despite Old Court's failure, MSSIC has failed to pay to each depositor in Old Court as of May 13, 1985, including plaintiffs, the amount of their investments (up to a maximum of $100,000 per account) pursuant to the terms of its contractual obligations to them.

158. By virtue of the foregoing, MSSIC has breached its contractual obligations to members of the class.

159. MDIF is liable on this claim as the successor in interest to MSSIC.

COUNT VIII
Conversion by Old Court

160. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 159.

161. Plaintiffs are unable to withdraw all or any part of their Certificates of Deposit in Old Court, either the principal amounts thereof or accrued interest.

162. Old Court, by its conservator and later receiver MDIF, has converted plaintiffs' property by refusing to accrue interest on Old Court Certificates of Deposits at the rate stated on such certificates, but rather accruing interest on all Certificates of Deposits which matured between May 13, 1985 and November 8, 1985 at the rate of 5 1/2 percent, and refusing to accrue any interest whatsoever on plaintiffs' Old Court Certificates of Deposit after November 8, 1985 no matter how long it takes MDIF or anyone else to release any money to plaintiffs due on their Certificates of Deposit.

163. MDIF is liable on this claim as the successor in interest to Old Court.

COUNT IX
Breach of Fiduciary Obligations by All
MSSIC Defendants and All Old Court Defendants

164. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 163.

165. By virtue of the foregoing, all of the MSSIC Defendants and all of the Old Court Defendants have breached their fiduciary obligations owed to the plaintiffs.

166. MDIF is liable to plaintiffs on this claim as the successor in interest to MSSIC and as the receiver of Old Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment on behalf of themselves and all the other members of the Class, as follows:

(a) Determining that this action is a proper Class Action under Rule 23 of the Federal Rules of Civil Procedure, an that the Class Action be so maintained on behalf of the Class defined, above:

(b) Awarding damages, compensatory and punitive, in favor of plaintiffs and the other Class Members;

(c) Awarding treble damages in favor of plaintiffs and other Class Members pursuant to 18 U.S.C. §1965(c).

(d) Awarding to plaintiffs prejudgment interest, the costs and disbursements of this action, including reasonable allowances of fees for plaintiffs' attorneys, accountants and experts and reimbursement of plaintiffs' expenses; and

(d) Granting such other further relief as this Court may deem just and proper.

Judith R. Cohn
Brian P. Flaherty

Supreme Court, U.S.
FILED
JUL 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1650

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FRANCINE TAFFLIN, et al.

Petitioners,

— v. —

JEFFREY A. LEVITT, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

M. Norman Goldberger
Brian P. Flaherty
*Gary L. Leshko
WOLF, BLOCK, SCHORR
AND SOLIS-COHEN
Twelfth Floor,
Packard Building
15th and Chestnut Streets
Philadelphia, PA 19102-2678
(215) 977-2000

Counsel for Petitioners

**Counsel of Record*

Of Counsel:

Lawrence I. Weisman
306A Hampton Plaza
300 E. Joppa Road
Towson, Maryland 20204
(301) 583-9030

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA 19103 (215) 563-9000

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in holding that federal courts do not have exclusive jurisdiction over civil actions brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, and that state courts have concurrent jurisdiction over such actions.

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Petitioners

A(1). Plaintiffs in No. 88-3019 below:

Francine Tafflin; Seymour Zuckerman; Eris Zuckerman; Renalee Selvin; Joan Zuckerman; Sylvia Zuckerman; Seymour Zuckerman, Executor of the Estate of Samuel Zuckerman; George R. Lyon; George C. Lyon; Peter M. Lyon; Bruce K. Lyon; Elizabeth A. Lyon; George R. Lyon and Mary G. Lathrop, Personal Representatives of the Estate of George M. Lyon; Kent H. Butcher; Stanley Z. Felsenberg, M.D., Personal Representative of the Estate of Minnie Felsenberg; Margaret Graves; Thurman L. Graves; Sandra L. Pletka; Gertrude Durso; Enterprise Equipment Co., Inc.;* Carmen R. Goldings; Clelia S. Goldings; Ethan D. Goldings; Herbet J. Goldings, M.D.; Sarah M. Goldings; Doris Konig; Windell R. Carter; Catherine Carter; Mitchell W. Landy; and Rio Grande Savings & Loan Association,* individually and as representatives of a class of purchasers of Old Court certificates of deposit (*see* Amended Complaint in the United States District Court for the District of Maryland, No. B-87-668, ¶ 1, J.A. 25).

A(2). Plaintiffs in No. 88-3020 below:

Francine Tafflin; Seymour Zuckerman; Eris Zuckerman; Renalee Selvin; Joan Zuckerman; Sylvia Zuckerman; Seymour Zuckerman, Executor of the Estate of Samuel Zuckerman; George R. Lyon; George C. Lyon; Peter M. Lyon; Bruce K. Lyon; Elizabeth A. Lyon; George R. Lyon and Mary G. Lathrop, Personal Representatives of the Estate of George M. Lyon; Gertrude Durso; Enterprise Equipment Co., Inc.;* Carmen R. Goldings; Clelia S. Goldings; Ethan D. Goldings; Herbert J. Goldings, M.D.; Sarah M. Goldings; Doris Konig; Windell R. Carter; Catherine Carter; Mitchell W. Landy; and Rio Grande Savings & Loan Association,* individually and as representatives of a class of purchasers of Old Court certificates of deposit (*see*

Amended Complaint in the United States District Court for the District of Maryland, No. B-87-684, ¶ 1, J.A. 82).

Respondents

B. Defendants in Nos. 88-3019 and 88-3020 below:

Jeffrey A. Levitt; LCP Corporation; Allan H. Pearlstein; Jerome S. Cardin; Light Street Partnership; Allen Feinberg; Robert D. Pearlstein; Samuel Shoubin; Dennis E. Guidice; Karol Levitt; Rosemary Pearlstein; Old Court Savings & Loan, Inc.; Maryland Savings-Share Insurance Corp.; Maryland Deposit Insurance Fund Corporation; Charles C. Hogg, II; Paul B. Trice, Jr.; George W. H. Pierson; Jerome F. Dolivka; Francis F. Anderson; Michael J. Dietz; Leonard Bass; John C. Donohue, Sr.; Henry R. Elsnic; John D. Faulkner, Jr.; James D. Laudeman; Terry L. Neifeld; Glass and Associates, P.A.; Cardin and Cardin, P.A.; Venable, Baetjer & Howard; and David Uhlfelder.

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*Pursuant to Supreme Court Rule 28.1, Petitioners state that neither Enterprise Equipment Co., Inc. nor Rio Grande Savings & Loan Association has any parent companies, subsidiaries or affiliates.

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No. 88-1650

IN THE

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Petitioners,

— v. —

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Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

CITATIONS TO OPINIONS OF COURTS BELOW

The opinion of the Court of Appeals is reported at 865 F.2d 595. The opinion of the District Court was delivered from the bench and has not been reported in any known official or unofficial reporter. The Opinions, Orders and Judgments issued by the United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Maryland are reproduced in the Appendix to the Petition for Writ of Certiorari at pp. A-1 through A-36.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 12, 1989. The Petition for Writ of Certiorari was filed on April 8, 1989, and this Court granted certiorari, limited to Question 2 presented by the petition, on May 30, 1989. This Court has jurisdiction to review the issues presented herein by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The verbatim text of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68, is set forth in the Appendix to this brief.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The two consolidated actions below arise from the failure of Old Court Savings & Loan, Inc. ("Old Court") and the attendant collapse of the Maryland Savings-Share Insurance Corporation ("MSSIC"), a private corporation controlled by the Maryland savings and loan industry, the asserted purpose of which was to regulate that industry and to protect depositors and investors in Maryland savings and loan institutions, such as Old Court, which were not federally insured. The failure of Old Court resulted directly from a massive fraud and other wrongful acts committed by the officers and directors of Old Court, the officers and directors of MSSIC, and the other defendants. (¶¶ 51-101, J.A. 94-112.)[1] The allegations of plaintiffs' Amended

1. Throughout this brief, paragraph references will be to the Amended Complaint in Civil Action No. B-87-684 in the United States District Court for the District of Maryland. (J.A. 73-125.) (No. B-87-684 was designated as No. 86-0092 when the action was initially instituted in the United States District Court for the Eastern District of Pennsylvania, prior to its transfer to the United States District Court for the District of Maryland.) In No. B-87-684, the plaintiff class consists only of citizens of states other than Maryland, thereby vesting the District Court with diversity jurisdiction, 28 U.S.C. § 1332, as well as federal question jurisdiction, 28 U.S.C. § 1331, since all defendants are Maryland citizens. The other action involved herein, No. B-87-668 (which was No. 86-0090 in the Eastern District of Pennsylvania), includes Maryland plaintiffs in addition to plaintiffs from other states. (J.A. 15-72.) In all other respects the actions are identical.

Complaints, which must be taken as true on review of a motion to dismiss, *Hishon v. King & Spalding*, 464 U.S. 69 (1984), set forth the following facts.

Plaintiffs in the instant actions (Petitioners in this Court) purchased certificates of deposit from Old Court in reliance upon the purportedly insured status of the certificates and representations by Old Court and MSSIC that such investments were safe. (*See, e.g.*, ¶¶ 13-48, J.A. 84-93.) These representations were made in connection with a massive national advertising campaign orchestrated by Old Court's principals, and through the preparation and distribution by Old Court and MSSIC of numerous letters, brochures and other materials emphasizing the risk-free nature of investments and deposits at Old Court based upon the representation that they were fully insured up to $100,000 per account. (¶¶ 79-80, 82, J.A. 100-101.)

These representations were false. The advertisements and other representations relied upon by plaintiffs and the public were intended to create, and did create, the false impression that Old Court certificates of deposit were safe investments, insured by a governmental agency similar to the Federal Deposit Insurance Corporation ("FDIC") and the Federal Savings and Loan Insurance Corportion ("FSLIC"). (¶ 83, J.A. 101.) Unknown to plaintiffs, Old Court's principals were using Old Court to raise large amounts of capital to dispose of and invest for their own personal benefit, through the generation of cash by selling Old Court certificates of deposit both inside and outside the State of Maryland. (¶¶ 75-79, J.A. 99-100.)

Moreover, while MSSIC was held out as a "regulator" of the Maryland savings and loan industry, it actually functioned as a captive agent of that industry and of Old Court in particular, participating in and covering up Old Court's fraud on the plaintiffs and other investors. (¶¶ 86-89, J.A. 104-107.) MSSIC

knew that Old Court certificates of deposit were not "safe" investments because, *inter alia,* several of Old Court's insiders were diverting substantial funds for their own use, Old Court was known by MSSIC to be a "habitual violator" of MSSIC's rules and regulations, and Old Court was making insider loans in amounts prohibited by MSSIC and state regulations. *Id.* In addition, MSSIC falsely represented to the public that its "insurance" was sufficient to protect each of the accounts at all of its 101 member savings and loan institutions, when in fact MSSIC had insufficient liquid assets to back up the claimed insurance. (¶ 90, J.A. 108-109.) Finally, MSSIC falsely implied that it was part of the government of Maryland and that it provided insurance comparable to that supplied by the Federal Government through FDIC and FSLIC. (¶¶ 90, 94, J.A. 108, 109-110.)

Each of the defendants participated in Old Court's fraud upon plaintiffs. (¶¶ 75-95, J.A. 99-110.) In addition, the various defendants knowingly and intentionally conspired with each other to cover up the fact that Old Court was being run solely for the benefit of those associated with it and that, as a result, Old Court was on the brink of financial disaster and was, in fact, insolvent. (¶¶ 84-99, J.A. 101-111.)

Ultimately, a run on Old Court took place, and Old Court was unable to meet the demands for withdrawals by its customers. On May 13, 1985, Old Court was placed in conservatorship and, on that day, an order was imposed in the conservatorship proceeding limiting withdrawals from Old Court to $1000 per account during each thirty-day period thereafter. (¶¶ 100-102, J.A. 111-112.) After approximately June 7, 1985, all withdrawals from all accounts at Old Court, including redemption of matured certificates of deposit, were prohibited, with a few minor exceptions, and the conservator announced that interest on the principal amount of mature certificates of deposit would accrue at the rate of 5½%, a rate considerably below the range of rates on the certificates themselves. (¶¶ 104-106, J.A. 112-113.) On or about November 8, 1985, the Old Court conservatorship proceeding was converted to a receivership proceeding in which the court entered an Order providing that owners of Old Court

certificates of deposit would not receive any interest on their certificates accruing after November 8, 1985. (¶¶ 107, 114, J.A. 113, 114.)

As a result of Old Court's collapse and its resulting failure to pay plaintiffs either the amounts they invested or the interest thereon, plaintiffs have been damaged and continue to be damaged. (¶¶ 112-117, J.A. 113-115.)[2]

II. PROCEDURAL HISTORY

In January, 1986, plaintiffs, individually and on behalf of two classes of purchasers of Old Court certificates of deposit, filed the instant actions in the United States District Court for the Eastern District of Pennsylvania, asserting claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, and the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78 *et seq.*, as well as various state law claims. The predicate acts which were alleged to form the pattern of racketeering activity were multiple acts of mail fraud, 18 U.S.C. § 1341, wire fraud, 18 U.S.C. § 1343, and securities fraud, 15 U.S.C. § 78j(b) and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5.

After the actions were filed in the Eastern District of Pennsylvania, all defendants responded with motions to dismiss and/or transfer the actions to the District of Maryland. On February 17, 1987, the District Court for the Eastern District of Pennsylvania transferred the cases to the District of Maryland.

Thereafter, the substantive motions of defendants to dismiss the case were renewed. Although a number of grounds in support of the motions were raised, only two of those grounds served as the basis for the decisions of the courts below. First, defendants asserted that the certificates of deposit purchased by plaintiffs were not securities as defined in the Exchange Act and

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2. Since the filing of the Amended Complaints, plaintiffs and other depositors in Old Court have received some payments of principal, but have not received the full amount of their principal, nor have they received any interest.

this Court's decision in *Marine Bank v. Weaver,* 455 U.S. 551 (1982), and therefore that no claim could be asserted under that Act.

Second, defendants asserted that the District Court should abstain from adjudicating plaintiffs' claims and dismiss the two cases because of the existence of pending state court actions relating to the Maryland savings and loan crisis. In support of this assertion, defendants contended that, because plaintiffs had failed to state a claim under the Exchange Act, which is subject to the exclusive jurisdiction of the federal courts, 15 U.S.C. § 78aa, and because jurisdiction over plaintiffs' only other federal claim, the RICO claim, was not exclusively federal, abstention and dismissal were appropriate since plaintiffs' RICO claim and their state law claims would be cognizable in Maryland state courts.[3] Defendants contended that abstention was appropriate under *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976), and *Younger v. Harris,* 401 U.S. 37 (1971).

In response, plaintiffs asserted that they had a viable claim under the Exchange Act, and that abstention and dismissal were inappropriate because, *inter alia,* jurisdiction over plaintiffs' federal claims under both the Exchange Act and RICO was committed exclusively to the federal courts. Since jurisdiction was exclusively federal, compelling plaintiffs to assert those claims in state court would effectively deprive them of their claims.[4]

—3. Defendants also contended that plaintiffs failed to state a claim under RICO as well, but that issue was not resolved by either court below. (*See* Appendix to Petition for Writ of Certiorari, at A-11—A-29, A-1—A-10.)

4. This Court has held that abstention is improper under *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976) when plaintiffs have alleged claims for which jurisdiction resides exclusively in the federal courts. *See Arizona v. San Carlos Apache Tribe of Arizona,* 463 U.S. 545, 559-560 (1983). Dismissal of a case on abstention grounds in the face of a claim for which jurisdiction is exclusively federal is clearly improper, since it leaves the plaintiff with no forum in which to vindicate rights guaranteed by federal law. *See Finkielstain v. Seidel,* 857 F.2d 893, 896 (2d Cir. 1988); *General Motors Corp. v. California State Bd. of Equalization,* 815 F.2d 1305, 1309 (9th Cir. 1987) (Kennedy, J.), *cert. denied,* 108 S. Ct. 1122 (1988); *Andrea*

The parties presented argument to the District Court on December 4, 1987. The court ruled from the bench that same day, dismissing both cases. (*See* Appendix to Petition for Writ of Certiorari, at A-11—A-29.) The District Court first held that plaintiffs had failed to state a cause of action under the Exchange Act because it found that the Old Court certificates of deposit were not securities. The court then considered the abstention issues raised by defendants, addressing first the question of whether state courts have concurrent jurisdiction over civil RICO causes of action. The court concluded that state courts have concurrent jurisdiction over civil RICO claims and, having decided that issue, determined that it was appropriate to abstain and dismiss the Amended Complaints under the doctrines set forth in *Burford, supra,* and *Colorado River, supra.* (*See* Appendix to Petition for Writ of Certiorari, at A-30—A-33.)

The Court of Appeals for the Fourth Circuit affirmed the District Court's Orders dismissing the actions in an opinion and judgment rendered on January 12, 1989. (*See* Appendix to Petition for Writ of Certiorari, at A-1—A-10, A-34—A-36.) The Fourth Circuit held that the Old Court certificates of deposit were not securities under the Exchange Act. With respect to the abstention issue, the Court of Appeals viewed its earlier decision in *Brandenburg v. Seidel,* 859 F.2d 1179 (4th Cir. 1988), as controlling.

Brandenburg was a case similar to the instant case,[5] in which depositors in a failed Maryland savings and loan had

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Theatres, Inc. v. Theatre Confections, Inc., 787 F.2d 59, 62-63 (2d Cir. 1986); *Middle South Energy, Inc. v. Arkansas Public Service Comm'n,* 772 F.2d 404, 417 (8th Cir. 1985), *cert. denied,* 474 U.S. 1102 (1986); *Cotler v. Inter-County Orthopaedic Ass'n,* 526 F.2d 537, 542 (3d Cir. 1975). *See also Kruse v. Snowshoe Co.,* 715 F.2d 120, 124 (4th Cir. 1983), *cert. denied,* 465 U.S. 1065 (1984); *Central States, Southeast & Southwest Areas Health & Welfare Fund v. Old Security Life Ins. Co.,* 600 F.2d 671, 676 (7th Cir. 1979). *Cf. Kartell v. Blue Shield of Massachusetts, Inc.,* 592 F.2d 1191 (1st Cir. 1979) (abstaining but retaining jurisdiction).

5. Although *Brandenburg* was also based upon the failure of a non-federally-regulated state savings and loan association in Maryland, the allegations upon which plaintiffs' RICO claims in the instant actions are based differ significantly from the claims of the *Brandenburg* plaintiffs.

asserted RICO claims and state law claims. The *Brandenburg* court held that *Burford* abstention was appropriate in view of Maryland's allegedly comprehensive scheme for the rehabilitation and liquidation of insolvent savings and loans. The court then addressed the plaintiffs' assertion that abstention was inappropriate because jurisdiction over civil RICO claims was exclusively federal. Concluding that jurisdiction was not exclusively federal, the *Brandenburg* court stated that "the state and federal courts share concurrent jurisdiction over civil RICO claims. Since this in turn means that the surrender of federal jurisdiction over the plaintiffs' [RICO] claims . . . will not result in the loss of any federal rights, we conclude that the district court did not abuse its discretion in dismissing the [RICO] claims under *Burford*." *Brandenburg*, 859 F.2d at 1195. Viewing *Brandenburg* as controlling, the Court of Appeals affirmed the District Court's decision herein dismissing plaintiffs' Amended Complaints.

Plaintiffs filed their Petition for Writ of Certiorari on April 8, 1989, presenting two questions for review: first, whether certificates of deposit such as those issued by Old Court are "securities" under the federal securities laws; and, second, whether jurisdiction over civil RICO claims lies exclusively with the federal courts. With respect to the RICO jurisdiction question, plaintiffs described the conflict among the federal courts of appeals[6] and the inconsistent results in the lower

6. *Compare Chivas Products, Ltd. v. Owen*, 864 F.2d 1280 (6th Cir. 1988) (finding exclusive federal-court jurisdiction) *with Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988) *and Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1302 (1988) (both finding concurrent jurisdiction). The Court of Appeals for the Seventh Circuit has indicated in *dictum* that it is leaning toward finding concurrent jurisdiction. *See County of Cook v. MidCon Corp.*, 773 F.2d 892, 905 n.4 (7th Cir. 1985). *But see Washington Courte Condominium Association-Four v. Washington-Golf Corp.*, 150 Ill. App.3d 681 (1986) (RICO jurisdiction exclusively federal); *Thrall Car Mfg. Co. v. Lindquist*, 145 Ill. App.3d 712 (1986) (same). Additionally, the Court of Appeals for the Fifth Circuit, in *Dubroff v. Dubroff*, 833 F.2d 557 (5th Cir. 1987), stated that, in its view, Texas courts would ultimately be likely to assume concurrent jurisdiction. *But see Main Rusk Associates v. Interior Space Constructors, Inc.*, 699 S.W.2d 305 (Tex. Ct. App. 1985) (RICO jurisdiction exclusively federal); *see also Hampton v. Long*, 686 F. Supp. 1202 (E.D. Tex. 1988) (refusing to find concurrent jurisdiction in light of *Main Rusk*).

federal courts[7] and state appellate courts.[8] This Court granted certiorari, limited to the question of civil RICO jurisdiction, on May 30, 1989.

SUMMARY OF ARGUMENT

This Court, most recently in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), has held that jurisdiction to hear

7. *Compare, e.g., Cacioppe v. Superior Holsteins III, Ltd.*, 650 F. Supp. 607 (S.D. Tex. 1986); *Spence v. Flynt*, 647 F. Supp. 1266 (D. Wyo. 1986); *Massey v. City of Oklahoma City*, 643 F. Supp. 81 (W.D. Okla. 1986); *Broadway v. San Antonio Shoe, Inc.*, 643 F. Supp. 584 (S.D. Tex. 1986); *Nordberg v. Lord, Day & Lord*, 107 F.R.D. 692 (S.D.N.Y. 1985); *Ideal Stencil Machine & Tape Co. v. Merchiori*, 600 F. Supp. 185 (S.D. Ill. 1985) (all finding exclusive federal-court jurisdiction) *with Ritchie v. Carvel Corp.*, No. 87 Civ. 8856 (S.D.N.Y. June 21, 1989); *Kim v. Pereira Enterprises, Inc.*, 694 F. Supp. 200 (E.D. La. 1988); *Village Improvement Ass'n v. Dow Chemical Co.*, 655 F. Supp. 311 (E.D. Pa. 1987); *Karel v. Kroner*, 635 F. Supp. 725 (N.D. Ill. 1986); *Chas. Kurz Co. v. Lombardi*, 595 F. Supp. 373 (E.D. Pa. 1984); *Luebke v. Marine National Bank*, 567 F. Supp. 1460 (E.D. Wis. 1983) (all finding concurrent jurisdiction). *See also Printing Mart-Morristown, Inc. v. Rosenthal*, 650 F. Supp. 1444 (D.N.J.) (refusing to decide jurisdictional issue but dismissing case on ground that plaintiff should have raised its RICO claims in prior state-court action to avoid effect of New Jersey "claim preclusion" doctrine), *appeal dismissed*, 833 F.2d 306 (3d Cir. 1987).

8. *Compare, e.g., Levinson v. American Accident Reinsurance Group*, 503 A.2d 632 (Del. Ch. 1985); *Thrall Car Mfg. Co. v. Lindquist*, 145 Ill. App.3d 712 (1986); *Maplewood Bank & Trust Co. v. Acorn, Inc.*, 207 N.J. Super. 590 (1985); *Vickers v. Niesz*, No. 88-CA-28 (Ohio App. February 17, 1989); *Greenstein, Logan & Co. v. Burgess Marketing, Inc.*, 744 S.W.2d 170 (Tex. Ct. App. 1987); *Main Rusk Associates v. Interior Space Constructors, Inc.*, 699 S.W.2d 305 (Tex. Ct. App. 1985) (all finding exclusive federal jurisdiction) *and VanderWeyst v. First State Bank of Benson*, 425 N.W.2d 803 (Minn.), *cert. denied*, 109 S.Ct. 369 (1988) (expressing "serious reservations" about assuming concurrent jurisdiction) *with Cianci v. Superior Court*, 40 Cal.3d 903 (1985); *Simpson Electric Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450 (1988); *Hoke v. E. F. Hutton & Co.*, 91 N.C. App. 159 (1988); *Village at Camelback Property Owners Ass'n v. Carr*, 371 Pa. Super. 452, *appeal granted*, 519 Pa. 668 (1988); *Rice v. Janovich*, 109 Wash.2d 48 (1987) (all finding concurrent jurisdiction).

causes of action under federal statutes is vested exclusively in federal courts if there is an explicit directive to that effect by Congress in the legislation; if an unmistakable implication that Congress so intended is found in the legislative history; or if an incompatibility exists between federal interests and the exercise of jurisdiction over such causes of action by the states.

In the case of civil RICO actions, no explicit directive exists in RICO itself as to this question. However, the two alternative *Gulf Offshore* factors are squarely met by RICO and require a holding that jurisdiction over civil RICO actions is exclusively federal. The legislative history establishes beyond question that when Congress enacted RICO it did so expressly intending that the remedies granted thereby would be modeled on those available under the Clayton Act. In particular, section 1964(c) of RICO, the operative provision creating a civil cause of action, was consciously modeled upon section 4 of the Clayton Act, which has been held by this Court to give exclusive jurisdiction to the federal courts. *See Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943). The language of the two statutes, with certain exceptions held by this Court to be immaterial, is virtually identical.

Under the teaching of *Cannon v. University of Chicago*, 441 U.S. 677 (1979) and similar cases, an accepted standard of statutory interpretation, when construing a statute which does not specifically address the question at issue, is to refer to similar statutes on which Congress modeled the enactment being construed. Congress is presumed to be familiar with the decisional law construing the statute on which it modeled the new statute and, unless a contrary indication appears, to incorporate by reference that decisional law. This Court has already adopted this very method of statutory construction in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), and *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143 (1987) with respect to RICO itself, using the Clayton Act model to guide its decisions on issues arising under RICO. Application of the Clayton Act model in this case compels a holding that jurisdiction over civil RICO actions is exclusively federal.

Moveover, there is a plain incompatibility between the exercise of state-court jurisdiction over civil causes of action under RICO and federal interests. RICO itself is a federal criminal statute, as are most of its underlying predicate acts, which are essential parts of a RICO cause of action. Congress has by statute expressly limited jurisdiction over criminal offenses against the United States to the federal courts. Its purpose in doing so is to confine adjudication of federal criminal laws to the United States District Courts to maintain consistency of interpretation and application. *See* 18 U.S.C. § 3231. Allowing state courts to adjudicate civil RICO claims, including the necessarily attendant interpretation and construction of federal criminal statutes as applied to the facts of each case, would expand enormously the number of courts considering important issues under federal criminal law. Such a result is completely inconsistent with the express intent of Congress that the federal courts alone should adjudicate federal criminal law.

RICO itself, as this Court pointed out in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951 (U.S. June 26, 1989), is an extremely complicated statute whose interpretation continues to evolve in the federal court system. Consistency of interpretation and predictability of this wide-sweeping statute is critical, especially in view of RICO's criminal applications.

Finally, Congress, in enacting RICO, adopted numerous procedural mechanisms, drawn from the Clayton Act, which enable private litigants and the government to pursue RICO claims effectively. These procedures are inconsistent with any assertion that the fifty state courts should have concurrent jurisdiction over civil RICO claims, because the procedural mechanisms are simply unavailable in state courts.

ARGUMENT

I. INTRODUCTION

The Court of Appeals' determination to affirm the District Court's decision to abstain and dismiss plaintiffs' Amended Complaints was predicated on its conclusion that civil actions

under RICO are within the concurrent jurisdiction of the state courts. (*See* pp. 7-8 above.) As will be demonstrated herein, that conclusion is inconsistent with this Court's prior precedents relating to the question of exclusive federal jurisdiction over cases arising under the laws of the United States and with the legislative history and purposes of RICO itself. The judgment of the court below should therefore be reversed.

II. UNDER THE DECISIONS OF THIS COURT, JURISDICTION OVER A FEDERAL CIVIL CLAIM IS EXCLUSIVELY FEDERAL IF CONGRESS EXPLICITLY SO DIRECTS; IF THE LEGISLATIVE HISTORY CONTAINS AN UNMISTAKABLE INDICATION THAT JURISDICTION IS EXCLUSIVELY FEDERAL; OR IF A CLEAR INCOMPATIBILITY EXISTS BETWEEN FEDERAL INTERESTS AND CONCURRENT JURISDICTION.

From the very beginnings of the United States, two propositions with respect to the judiciary power of the national government have been assumed to be true: first, that Congress can grant exclusive jurisdiction over cases arising under the Constitution, treaties and laws of the United States to the federal courts; and second, that the state courts can have concurrent jurisdiction with the federal courts over such cases if Congress does not grant exclusive jurisdiction to the federal courts. The principle was made clear by Alexander Hamilton:

> I mean not therefore to contend, that the United States, in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation, to the federal courts solely, if such a measure should be deemed expedient; but I hold that the state courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of the opinion, that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. . . . When

> . . . we consider the state governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited.

The Federalist No. 82 (A. Hamilton).

Hamilton's views are by no means surprising in view of the Framers' specific decision to "give Congress the option whether to create lower federal courts." Redish and Muench, *Adjudication of Federal Causes of Action in State Court,* 75 Mich. L. Rev. 311, 314 (1976). Since it was not at all clear when the Constitution was written that any lower federal courts would be created, it was understood that "state courts would be competent to hear federal causes of action." *Id.*

The principle enunciated by Hamilton with respect to the question of exclusive federal jurisdiction was addressed for the first time by this Court in *Claflin v. Houseman,* 93 U.S. 130 (1876). In *Claflin,* this Court adopted Hamilton's view and set forth the test for determining when exclusive jurisdiction vests in the federal courts:

> [T]he general principle being, that, where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself; but, if exclusive jurisdiction be *neither express nor implied,* the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.
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> * * * *
>
> The general question, whether State courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws, and treaties of the United States, has been elaborately discussed . . . but the result of these discussions has . . . been . . . to affirm the jurisdiction, where it is not excluded by express provision, or *by incompatibility in its exercise arising from the nature of the particular case.*

* * * *

> [W]here a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction. This jurisdiction is sometimes exclusive by express enactment and sometimes by *implication*.

93 U.S. at 136, 137 (emphasis added) (citations omitted).

Under *Claflin*, in every case raising the question of exclusive federal jurisdiction, the inquiry is (1) whether Congress expressly conferred such exclusive jurisdiction; or, if not, (2) did Congress do so by implication; or (3) would concurrent jurisdiction be incompatible with the federal interests to be served by the underlying legislation. The *Claflin* test for determining whether, under a given federal statute, jurisdiction is exclusive in the federal courts has remained the law for over a century.

Subsequent to *Claflin* the Court applied the rationale of its decision in that case to *Missouri ex rel. St. Louis, Brownsville & Mexico Ry. v. Taylor*, 266 U.S. 200 (1924), and *Second Employers' Liability Cases*, 223 U.S. 1 (1912). Each of those cases involved statutes giving a right of action for damages arising out of the negligence of common carriers. In *Second Employers' Liability Cases*, the Court held that actions under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, by an injured railroad employee and representative of a deceased employee for damages resulting in whole or in part from the employers' negligence could be brought in state court.[9] 223 U.S. at 57-59. In *Missouri v. Taylor*, the Court held that a claim under the Carmack Amendment to the Interstate Commerce Act (now codified at 49 U.S.C. §§ 10103, 10730, 11707), imposing liability on the ground of negligence on a common carrier for damage to property, was appropriately brought in state court. 226 U.S. at 208. Both of these cases, therefore, are instances in which the Court found concurrent jurisdiction where the causes of action,

9. The Court has also held, without any reference to *Claflin*, that jurisdiction under section 33 of the Merchant Marine Act of 1920 (Jones Act), 46 U.S.C. § 688, which incorporates by reference the Federal Employers' Liability Act, is concurrent. *See Engel v. Davenport*, 271 U.S. 33 (1926).

while federal, were essentially based on common law negligence.[10] Thus, in each of these cases no Congressional intent to make jurisdiction exclusive and no incompatibility between state-court jurisdiction and the statutory purposes could be identified.

The most recent applications of the *Claflin* analysis were undertaken in *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), and *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 413 (1981).[11] At issue in *Charles Dowd* was whether section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), which provides in relevant part that "suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States . . .", created exclusive jurisdiction in the federal courts over such actions. In making its determination, this Court reaffirmed the *Claflin* test and pronounced it "unmodified through the years." 368 U.S. at 508.

Application of the *Claflin* test to section 301(a) compelled the conclusion that the state courts had concurrent jurisdiction over actions brought under that statute. At the outset, the Court determined that Congress had not expressly made federal-court jurisdiction exclusive by virtue of the language of the statute providing that suits "may be brought in any district court." 368 U.S. at 506. The question was therefore presented whether Congress had intended by implication to create exclusive jurisdiction in the federal courts. 368 U.S. at 507.

In answering this question, the Court considered the full legislative history of section 301(a). That consideration revealed

10. The Federal Employers' Liability Act did, of course, change the common law of employer liability generally applied at the time of its enactment by eradicating some defenses available to the employer. The fundamental issues that remain in all FELA cases, however, *i.e.*, whether the employer was negligent and, if so, whether the "negligence played any part, however small, in the injury or death which is the subject of the suit," *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 508 (1957), are ones which derive from common law principles with which state courts are familiar.

11. *See also Martinez v. California*, 444 U.S. 277, 283 n.7 (1980) and note 13 *infra* p. 19.

not only that Congress had not intended to make jurisdiction under section 301(a) exclusive but, on the contrary, intended to *expand* the forums in which suits could be brought in controversies between an employer and a labor organization. Congress did so because, prior to the enactment of section 301(a), while state courts had been open to traditional breach of contract actions such as those contemplated by section 301(a), they were at times inhospitable to such suits in the labor-management relations context because of the procedural difficulties that could be present in causes of action against labor organizations "by reason of their status as unincorporated associations." 360 U.S. at 510. Congress enacted section 301(a) to remedy this difficulty. For this reason, the Court concluded:

> The legislative history makes clear that the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations. Moreover, there is explicit evidence that Congress expressly intended not to encroach upon the existing jurisdiction of the state courts.

368 U.S. at 508-09.[12]

On the facts of *Charles Dowd*, no implication that Congress had intended section 301(a) to be within the exclusive jurisdiction of the federal courts was possible, given the very purpose of the statute to expand the forums available for suit and the legislative history surrounding its enactment.

The next case before this Court presenting a question of exclusive jurisdiction was *Gulf Offshore Co. v. Mobil Oil Corp.*, *supra*. There, the Court reaffirmed the basic approach to the question of exclusive jurisdiction set forth in *Claflin* and *Charles Dowd*, and described the analytical framework to be used in determining whether federal-court jurisdiction over a federal statute is exclusive:

12. Although *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), had held that the applicable law to be applied under section 301(a) was federal common law, it also "emphasized that '[a]ny state law applied . . . will be absorbed as federal law.' " *Charles Dowd*, 368 U.S. at 507 (quoting *Textile Workers*, 353 U.S. at 457).

> In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. *Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.*

453 U.S. at 478 (emphasis added) (citations omitted).

In *Gulf Offshore*, the Court considered whether lawsuits arising under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* ("OCSLA"), were subject to the exclusive jurisdiction of federal courts. Pursuant to the provisions of OCSLA, the outer continental shelf was declared to be "an area of 'exclusive federal jurisdiction.' " 453 U.S. at 479 (quoting 43 U.S.C. § 1333(a)(1)). Although all of the law under OCSLA was federal, it borrowed the " 'applicable and not inconsistent' " laws of states adjacent to the areas of the oceans comprising the outer continental shelf to act as "surrogate federal law" and to fill in the " 'gaps' " in the coverage afforded by federal law. 453 U.S. at 480-81 (quoting 43 U.S.C. § 1331(a)(2)).

The underlying litigation in *Gulf Offshore* was a personal injury action for injuries sustained by a worker on an oil-drilling platform located on the outer continental shelf off the coast of Louisiana. Pursuant to OCSLA, the personal injury law of Louisiana was "borrowed" to govern the plaintiff's action for the injuries he sustained. As this Court emphasized, the issue in *Gulf Offshore* involved only whether state courts had jurisdiction over actions under OCSLA that were governed by state law incorporated into OCSLA. The Court expressly reserved decision as to jurisdiction over suits involving provisions of OCSLA other than those incorporating state law. 453 U.S. at 480 n.7.

The Court first noted that OCSLA contained no explicit statutory directive mandating exclusive federal jurisdiction over

cases based upon borrowed state law. 453 U.S. at 478. Moreover, the Court found no "unmistakable implication" of exclusivity in the legislative history, nor did it find any incompatibility between federal interests and state-court jurisdiction over actions arising under OCSLA which utilized incorporated state tort law as the governing law, reasoning that:

> [t]he operation of OCSLA will not be frustrated by state-court jurisdiction over personal injury actions. The factors generally recommending exclusive federal-court jurisdiction over an area of federal law include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims. *These factors cannot support exclusive federal jurisdiction over claims whose governing rules are borrowed from state law.* There is no need for uniform interpretation of laws that vary from State to State. State judges have greater expertise in applying these laws and certainly cannot be thought unsympathetic to a claim only because it is labeled federal rather than state law.
>
> Allowing personal injury and contract actions in state courts will advance interests identified by Congress in enacting OCSLA. A recurring consideration in the deliberations leading to enactment was "the special relationship between the men working on these [platforms] and the adjacent shore to which they commute to visit their families." Allowing state-court jurisdiction over these cases will allow these workers, and their lawyers, to pursue individual claims in familiar, convenient, and possibly less expensive fora.

453 U.S. at 483-84 (footnotes and citations omitted) (emphasis added). Consequently, the Court held that state courts had concurrent jurisdiction to adjudicate cases which required the

application of substantive state law that had been incorporated into the federal statute as the governing standard. 453 U.S. at 484.[13]

Claflin, Charles Dowd, and *Gulf Offshore* establish that, in the absence of an express legislative grant of exclusive federal-court jurisdiction, the language, structure, legislative history, and underlying policies of the particular statute at issue must be examined to determine whether federal-court jurisdiction is exclusive. *See Gulf Offshore,* 453 U.S. at 484. Examination of those factors in *Charles Dowd* and *Gulf Offshore* revealed that Congress in fact intended state courts to have concurrent jurisdiction over the statutes which were at issue. As applied to RICO, such an examination reveals an unmistakable implication arising from the legislative history that Congress intended jurisdiction over civil RICO actions to be exclusively federal, and a clear incompatibility between the federal interests reflected in RICO and state-court jurisdiction. Together, these factors compel the conclusion that civil RICO actions are within the exclusive jurisdiction of the federal courts.

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13. The only case in this Court to discuss *Gulf Offshore* with respect to the issue of exclusive jurisdiction was *Hathorn v. Lovorn*, 457 U.S. 255 (1982). While *Hathorn* reaffirmed the *Gulf Offshore* principles, the Court found it unnecessary to apply them because the narrow issue before the Court was whether state courts could decide collaterally issues arising under section 5 of the Voting Rights Act. Consistent with prior case law, the Court held that state courts could decide such issues collaterally. 457 U.S. at 266 and n.18.

It should also be noted that the Court in *Felder v. Casey,* 108 S. Ct. 2302 (1988), stated that jurisdiction over claims under the Civil Rights Act of 1871, 42 U.S.C. § 1983, is concurrent in federal and state courts. 108 S. Ct. at 2307, 2311 (citing *Patsy v. Board of Regents,* 457 U.S. 496 (1982)). *See also Martinez v. California,* 444 U.S. 277, 283 n.7 (1980). The *Felder* Court did not apply the *Gulf Offshore* analysis, but apparently based its statement on a specific Congressional intent, expressly discussed by the Court in *Patsy,* that jurisdiction over section 1983 actions was to be concurrent. *See Patsy,* 457 U.S. at 506-07.

III. APPLICATION OF THIS COURT'S TEST FOR EXCLUSIVE JURISDICTION DEMONSTRATES THAT JURISDICTION OVER CIVIL RICO ACTIONS IS EXCLUSIVELY FEDERAL.

A. A Review of RICO's Legislative History Demonstrates Unmistakably That Congress Intended That RICO Jurisdiction Should Be Exclusively Federal.

1. RICO's Legislative History Shows That Congress Explicitly Intended To Provide In RICO The Same Procedural Remedies That Are Available To Private Litigants Under The Clayton Act.

The question presented to the Court in this case is whether section 1964(c) of RICO vests jurisdiction over civil RICO actions exclusively in the federal courts or concurrently in federal and state courts. Section 1964(c), which creates the RICO civil action, provides, in its entirety, as follows:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c).

Over its past several terms, this Court has considered a number of questions arising under RICO, including section 1964(c) itself and, in doing so, has already reviewed much of the legislative history relevant to consideration of the issue present in the instant case. *See, e.g., Agency Holding Corp. v. Malley-Duff & Associates,* 483 U.S. 143 (1987); *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479 (1985); *United States v. Turkette,* 452 U.S. 476 (1981).

RICO represented a new federal effort to attack what was seen to be the serious national problem of expanding organized criminal activity. Accordingly, in *Turkette*, the Court based its holding with respect to the meaning of the term "enterprise" under RICO, at least in part, on its view of Congress' express

intent to provide in RICO remedies theretofore not available to attack organized crime:

> [T]he language of the statute and its legislative history indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of this measure. Indeed, the very purpose of the Organized Crime Control Act of 1970 was to enable the Federal Government to address a large and seemingly neglected problem. The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions. That Congress included within the definition of racketeering activities a number of state crimes strongly indicates that RICO criminalized conduct that was also criminal under state law, at least when the requisite elements of a RICO offense are present. As the hearings and legislative debates reveal, Congress was well aware of the fear that RICO would "mov[e] large substantive areas formerly totally within the police power of the State into the Federal realm." 116 Cong. Rec. 35217 (1970) (remarks of Rep. Eckhardt).

452 U.S. at 586-87.

As explained in *Sedima* and *Malley-Duff*, however, the remedies and accompanying procedures used in RICO were not wholly new; they were expressly modeled on the remedies available under the Clayton Act. In *Sedima*, the Court discussed at some length the legislative history of section 1964(c), concluding that "[t]he clearest current in [RICO's legislative] history is the reliance on the Clayton Act model . . .", 473 U.S. at 489, a conclusion reaffirmed in *Malley-Duff*, 483 U.S. at 151. In *Malley-Duff*, in fact, to demonstrate the point, the Court quoted section 1964(c) and section 4 of the Clayton Act, 15 U.S.C. §15(a), side by side to demonstrate the similarity of their language.[14] *See* 483 U.S. at 150-51. Importantly, the Court had

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14. At the time RICO was enacted, section 4 of the Clayton Act provided:

> Any person who shall be injured in his business or property by reason of

earlier noted in *Sedima* that, although the language of the two sections differs in some respects, the differences are not material and do not detract from the essential identity of the provisions.[15]

The Court did not, however, base its holdings in *Sedima* and *Malley-Duff* only on the similarity of the language in RICO and the Clayton Act. It also relied upon the repeated statements of RICO's sponsors to the effect that Congress had expressly intended to follow the Clayton Act model when it enacted RICO. For example, Representative Steiger stated that the private treble damage section of what was to become RICO was "similar to the private damage remedy found in the antitrust laws . . ." *Sedima*, 473 U.S. at 489 (quoting Hearings on S.30, and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., at 520 (1970)). Representative Steiger viewed the RICO civil enforcement remedy as a "parallel private . . . remed[y]" to the Clayton Act. 116 Cong. Rec. 27739 (1970) (letter to House Judiciary Committee), *quoted in Malley-Duff*, 483 U.S. at 152, and *Sedima*, 473 U.S. at 489 n.8.

The Court also pointed out that the American Bar Association had proposed an amendment, which was ultimately adopted in substance, "to include the additional civil remedy of authorizing private damage suits based upon the concept of section 4 of the Clayton Act." *Malley-Duff*, 483 U.S. at 152 (quoting Hearings on S.30, and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., at 543-44 (1970)). The Court further noted that an early version of RICO proposed by Senator Hruska had explicitly adopted "antitrust concepts to thwart organized crime," *Malley-Duff*, 483 U.S. at 151 (quoting Report of the Ad

NOTES *(Continued)*

anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15. The Court suggested that the "language [used in RICO] was chosen simply because it is more succinct" and because it "is consistent" with other provisions in RICO. *See Sedima*, 473 U.S. at 489 n.8.

Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law, at 78 (1985) (hereinafter "RICO Task Force Report")), and that Senator Hruska viewed RICO as a means to utilize the "extraordinarily broad and flexible remedies" available under the antitrust laws in the fight against organized crime. *Malley-Duff*, 483 U.S. at 151 (quoting 113 Cong. Rec. 17999 (1967)); *see also Sedima*, 473 U.S. at 489 n.8.

The practical significance of the similarity in language and intent between RICO's section 1964(c) and section 4 of the Clayton Act is that it has enabled the Court to resolve issues arising under RICO by reference to the Clayton Act. Thus, in *Sedima*, the Court concluded that civil liability under RICO did not require a prior criminal conviction of an underlying predicate act or of RICO itself, in part because no such requirement existed under section 4 of the Clayton Act. *Sedima*, 473 U.S. at 489, 492. Similarly, in *Malley-Duff*, the Court held that the four-year Clayton Act statute of limitations would be applied to RICO. *Malley-Duff*, 483 U.S. at 156.

At the same time it is important to recognize that Congress did not adopt in RICO all of the substantive principles of antitrust law, such as the requirements of "antitrust standing" or "antitrust injury." The Antitrust Section of the American Bar Association, while strongly supporting "the use of the antitrust machinery as a weapon against organized crime," disagreed with the originally proposed concept of placing the new organized crime provision into the Sherman Act. 115 Cong. Rec. at 6995 (1969) (Report of Antitrust Section of the American Bar Association); *see Sedima*, 473 U.S. at 487, 498. The ABA's position was based upon its concern that private litigants seeking redress for injuries caused by organized criminal activity would be hampered in their efforts by the body of substantive precedent developed in the antitrust context, which set "strict requirements on questions such as 'standing to sue' and 'proximate cause.' " 115 Cong. Rec. at 6995 (1969); *see Sedima*, 473 U.S. at 498. The ABA proposed that the "antitrust-type enforcement and discovery procedures" that were planned to be used to combat organized crime be placed in a separate statute. 115 Cong. Rec. at 6995 (1969).

Congress adopted the ABA's recommendation. As enacted, RICO does not contain, nor is it subject to, the substantive body of precedent developed in the antitrust context governing "antitrust standing", "antitrust injury", or other elements of antitrust claims that have been developed by the courts over the past century. *See Sedima*, 473 U.S. at 498-99. That it does not, however, does not detract from the conclusion that Congress expressly modeled RICO's machinery and procedures upon those contained in the antitrust laws, adopting those procedural tools for use in the fight against organized crime. *See Malley-Duff*, 483 U.S. at 151-53; *see also* 115 Cong. Rec. at 6995 (1969). *Compare, e.g.*, 18 U.S.C. § 1965 (venue and process provisions of RICO) *with* 15 U.S.C. §§ 22, 23 (venue and process provisions of Clayton Act.)[16]

16. This distinction between procedure and substantive law has been virtually ignored by the courts that have erroneously read *Sedima* as having rejected the conscious patterning of section 1964(c) of RICO upon the Clayton Act for purposes of construing RICO. For example, in *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987), the court, while recognizing that the issue in *Sedima* involved standing rather than jurisdiction, held that the similarity between RICO and the Clayton Act "does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language." *Id.* at 737. See also *Cianci v. Superior Court*, 40 Cal.3d at 911-12. This statement, however, proves too much, since there is no question that RICO and the Clayton Act were not intended to be identical in all respects. However, the legislative history of RICO, as explained above, establishes the distinction made by Congress between importing substantive elements of antitrust claims into RICO and utilizing the well-proven machinery and procedural devices available under the antitrust laws to effectuate the substantive purposes of RICO. The foregoing courts failed to consider this critical legislative history, and thus misapplied *Sedima*. Petitioners submit that the principled distinction explained in the text correctly reflects the Congressional intent evidenced in the legislative history as well as this Court's previous interpretation of the statute. Conversely, the approach taken in the cases cited above ignores the importance of the relationship between RICO and the Clayton Act established by the legislative history and this Court's decisions in *Sedima* and *Malley-Duff*.

2. In Light Of Congress' Intent To Model RICO On The Clayton Act, As To Which Jurisdiction Is Exclusively Federal, Its Intent Is Unmistakable That Jurisdiction Over Civil RICO Actions Is Also Exclusively Federal.

Section 4 of the Clayton Act has long been held to confer exclusive jurisdiction on the federal courts. *See, e.g., Freeman v. Bee Machine Co.*, 319 U.S. 448, 451 n.6 (1943); *Blumenstock Brothers Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436, 440 (1920); *see also Hathorn v. Lovorn*, 457 U.S. 255, 267 n.18 (1982).[17]

Consistent application of the Court's approach to interpreting civil RICO in *Malley-Duff* and *Sedima, i.e.*, by reference to the conscious Congressional intent to model RICO on the Clayton Act, impels a ruling that the federal courts have exclusive jurisdiction over civil RICO actions because the Clayton Act has long been within the exclusive jurisdiction of the federal courts. This result is not only consistent with *Sedima* and *Malley-Duff*, but also with numerous other decisions of this Court, which has repeatedly taken the approach, in dealing with similar issues of statutory construction, that Congress must be presumed to have knowledge of a judicial interpretation of a prior law when it enacts a new statute with similar language. *See Cannon v. University of Chicago*, 441 U.S. 677, 694-98 (1979); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982). Thus, by adopting the language used in section

17. Exclusive federal-court jurisdiction over the Clayton Act has remained unquestioned even though the operative language of section 4, which is identical to the corresponding language of section 1964(c) of RICO, provides that persons injured by violations of the respective statutes "*may* sue therefor" in any United States District Court. 15 U.S.C. § 15(a) (emphasis added). Accordingly, those courts that have purported to find significance in the use of the word "may" in section 1964(c), as opposed to another term such as "must" or "shall", erroneously failed to give sufficient consideration to the clear intent of Congress in modeling RICO upon the Clayton Act and its well-settled judicial interpretation. *See, e.g., Brandenburg v. First Maryland Savings and Loan*, 660 F. Supp. 717, 731 (D. Md. 1987), *aff'd*, 859 F.2d 1179 (4th Cir. 1988); *Simpson Electric Corp. v. Leucadia, Inc.*, 72 N.Y.2d at 457.

4 of the Clayton Act when it enacted section 1964(c) of RICO, "Congress 'must be considered to have adopted also the construction given by this Court to such language, *and made it a part of the enactment*.'" *Shapiro v. United States*, 335 U.S. 1, 16 (1948) (quoting *Hecht v. Malley*, 265 U.S. 144, 153 (1924)) (emphasis added).

The Court's decision in *Cannon* is particularly instructive. There, the Court compared the language of section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, with the language of section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, upon which section 901(a) of Title IX was patterned, in order to determine whether a private right of action could be maintained under section 901(a). Title VI had previously been held by lower federal courts to provide a private right of action. *See Cannon*, 441 U.S. at 696 and nn. 20 & 21. The Court noted that the statutes had similar administrative mechanisms and that neither statute contained an express provision for a private right of action. 441 U.S. at 695-96 and n.19. Significantly, however, by the time Title IX had been enacted, "the critical language in Title VI had already been construed as creating a private remedy." 441 U.S. at 696.[18] In light of the legislative history and the clear patterning of section 901(a) of Title IX upon the analogous provisions of section 601 of Title VI, the Court stated that when Congress drafted Title IX, Congress "explicitly assumed that [Title IX] would be interpreted and applied as Title VI had been," and concluded that:

> [i]t is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.

18. The Court also noted that it had previously interpreted comparable language in section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, as providing a private remedy. 441 U.S. at 698 (citing *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969)).

* * * *

> In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.

441 U.S. at 696-99.

The *Cannon* analysis is directly applicable to the issue now before the Court. In *Cannon*, neither statute contained an express provision granting a private right of action; here, neither RICO nor the Clayton Act contains an express provision mandating exclusive federal-court jurisdiction. Title IX of the Education Amendments was consciously patterned upon Title VI of the Civil Rights Act of 1964; RICO's jurisdiction provision was consciously and explicitly patterned upon section 4 of the Clayton Act. In this regard, the comments of members of Congress as quoted and relied upon by the Court in *Cannon* are remarkably like that of the Congressional managers of the RICO legislation. *Compare* the remarks of Senator Bayh in commenting upon Title IX: "the same [enforcement] procedure that was set up and has operated with great success under the 1964 Civil Rights Act, and the regulations thereunder[,] would be equally applicable to discrimination [prohibited by Title IX]," *Cannon*, 441 U.S. at 696 n.19 (quoting 117 Cong. Rec. 30408 (1971)), *with* the similar remarks of Senator Hruska upon introducing an earlier version of the bill that became RICO (and that contained a civil remedy provision virtually identical to the one finally enacted): "The Bill is innovative in the sense that it vitalizes procedures which have been tried and proven in the antitrust field and applies them into the organized crime field where they have been seldom used before." 115 Cong. Rec. 6993 (1969).

Indeed, the legislative history of RICO provides even more compelling support for the presumption of Congressional knowledge of previous relevant judicial pronouncements than was present in *Cannon*, and demonstrates that for RICO, the presumption is in fact true. Representative McClory, who was a member of the House subcommittee which heard testimony on

the bill that became RICO, responded on the House floor during final consideration of the bill to critics who had suggested that the bill was poorly drafted that, "in my experience, no single measure has received more thorough consideration by a legislative committee than this bill. . . . *Precedents as contained in numerous court decisions were reviewed and weighed and every effort was made to produce a strong and effective tool with which to combat organized crime.*" 116 Cong. Rec. 35204 (1970) (emphasis added).

Thus, under this Court's longstanding approach to statutory interpretation and construction, Congress must be presumed both to have been aware of the prior judicial interpretation of section 4 of the Clayton Act, and to have expected section 1964(c) of RICO to be interpreted in the same fashion. Accordingly, the "unmistakable implication" of exclusive federal-court jurisdiction required by *Gulf Offshore* is plainly apparent in RICO's legislative history.

B. The Language, Structure, And Purposes Of RICO Are Incompatible With Concurrent State-Court Jurisdiction Over Civil RICO Actions.

As explained above, the only implication to be drawn from RICO's legislative history is a Congressional intention that civil RICO actions be subject to exclusive federal-court jurisdiction. This conclusion is strongly supported by an analysis of the overall structure of, and policies underlying, RICO's statutory scheme, which is incompatible with any viable concept of concurrent state-court jurisdiction. As discussed more fully below, in light of "[t]he federal policies at stake and the practicalities of litigation," *Malley-Duff*, 483 U.S. at 153, jurisdiction over civil RICO claims should be held to be exclusively federal.

1. The Effective And Consistent Implementation Of The Federal Criminal Laws Requires That Jurisdiction Over RICO Remain Exclusively Federal. –

This Court has recently described the operative provision of RICO, holding that the statute:

> imposes criminal and civil liability upon those who engage in certain "prohibited activities". Each prohibited activity is defined in 18 U.S.C. § 1962 to include, as one necessary element, proof either of "a pattern of racketeering activity" or a "collection of unlawful debt". "Racketeering activity" is defined in RICO to mean "any act or threat involving" state-law crimes, any "act" indictable under various specified federal statutes, and certain federal "offenses".

H.J. Inc. v. Northwestern Bell Telephone Co., 57 U.S.L.W. 4951 (U.S. June 26, 1989).

In enacting RICO, Congress chose to federalize certain state statutes, specifically those relating to murder, kidnapping, gambling, arson, robbery, bribery, extortion, and dealing in obscene matter or narcotics, while at the same time providing that the vast majority of violations which constitute predicate acts would be federal crimes. *See* 18 U.S.C. § 1961(1)(B). Indeed, the experience to date under civil RICO has been that:

> the large majority of civil RICO complaints use mail fraud, wire fraud or securities fraud as the required predicate offenses.

Malley-Duff, 483 U.S. at 149 (citing RICO Task Force Report at 56-57); *see also Chivas Products*, 864 F.2d at 1285 (great preponderance of civil RICO cases allege federal offenses of mail or wire fraud or federal securities fraud).

In every RICO case, the court, or a jury following the court's instructions, will be required to determine whether the requisite criminal conduct constituting the predicate acts has been committed. The predicate offenses of mail fraud, wire fraud, and securities fraud, as well as the majority of other predicate offenses, are complex federal criminal statutes with

which the state courts have had little or no experience. *See Chivas Products*, 864 F.2d at 1285. The reason that state courts have no experience with these predicate criminal acts is that Congress, in the Judiciary Act of 1789, 1 Stat. 73, committed jurisdiction over all federal crimes exclusively to the federal courts, where it has remained to this day.[19] The current version of the statute so doing is 18 U.S.C. § 3231, which provides as follows:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States . . . .

Congress' purpose in confining jurisdiction exclusively to the federal courts is readily apparent: to limit the number of courts in which the federal government's criminal laws would be interpreted so that the statutes would be uniformly applied and the federal criminal law could develop in a consistent and orderly fashion.

This Court has previously recognized this to be Congress' purpose in explicitly limiting jurisdiction over a given subject area to a specific tribunal. In *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485 (1953), the Court considered whether a labor dispute plainly within the scope of the National Labor Relations Board ("NLRB") was also subject to the jurisdiction of a state labor relations act and of that state's courts. This Court held that states could not adjudicate such cases, reasoning that:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confine primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a

19. From time to time, some discrete federal criminal statutes have allowed concurrent jurisdiction. *See* Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545 (1925).

> final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.

346 U.S. at 490-91.[20]

As in the context of the NLRB, Congress' exclusion of the state courts from jurisdiction over federal crimes evinces a Congressional intent to avoid the kind of "incompatible and conflicting adjudications" which the Court recognized would follow from state-court adjudication. 346 U.S. at 491. Thus, in evaluating the degree of incompatibility between the federal interests reflected in RICO and state-court jurisdiction, the issue is not simply whether state courts should be involved in the adjudication of RICO itself, *see infra* pp. 33-37, but also whether they should be involved in the interpretation and application of the numerous federal criminal statutes which comprise the great majority of the predicate racketeering offenses, and with which they are virtually completely unfamiliar.

Exclusive federal-court jurisdiction over federal criminal statutory offenses has led to consistent interpretations of those statutes in the federal courts as the federal criminal laws have evolved. If state courts are permitted to interpret federal criminal statutes, they will create a body of precedent relating to those statutes and a resultant loss of control by the federal courts over the orderly development of federal criminal law. Congress

20. The need for such uniform application of criminal laws in particular has also been recognized by this Court, albeit in a different context. In *Abelman v. Booth*, 21 How. (62 U.S.) 506 (1859) and *United States v. Tarble*, 13 Wall. (80 U.S.) 397 (1872) this Court recognized the need for uniform application of the criminal laws, "for if left to the courts of justice in the several states, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences of which we have spoken." *Abelman*, 21 How. (62 U.S.) at 517-18.

has not delegated such authority to the state courts, and could not have intended such a disruptive result. With respect to civil RICO, "the desirability of uniform interpretation" and "the expertise of federal judges in federal law," *Gulf Offshore*, 453 U.S. at 484, is readily apparent.

Those courts that have analogized RICO predicate offenses to "garden variety fraud" or have pointed out that some of the RICO predicate acts are state crimes, and have concluded that there is, therefore, no incompatibility with state-court jurisdiction over RICO and federal interests, simply miss the point.[21] Congress chose to federalize certain state criminal law in RICO,[22] and by so doing, it created a new species of *federal* crimes and *federal* rights dependent on an interstate commerce nexus. *See Malley-Duff*, 483 U.S. at 153-54. Congress did not, however, by the mere inclusion of state-prohibited crimes in RICO, delegate to the state courts an entirely new responsibility for interpreting federal criminal law, and repeal *sub silentio* 18 U.S.C. § 3231. Concurrent state-court jurisdiction over civil RICO actions would, however, inevitably have the effect of altering the method by which federal criminal jurisprudence develops.

The federal criminal laws are constantly evolving, and their contours and definitions are subject to change as this Court and the twelve federal courts of appeals render new decisions. *See, e.g., McNally v. United States*, 483 U.S. 350 (1987). While the state courts are perfectly capable of applying precedent enunciated by this Court, they are not the judicial authority to which Congress has granted the exclusive authority to interpret and

21. *See, e.g., Cianci v. Superior Court*, 40 Cal.3d at 914; *Rice v. Janovich*, 109 Wash.2d at 55.

22. Importantly, however, "garden variety fraud" is *not* a predicate offense; mail fraud is, and, in civil RICO actions in which plaintiffs seek to characterize acts constituting "garden variety fraud" as mail fraud or wire fraud, as they must to make out a RICO claim, reference must constantly be made by the litigants and courts to the body of substantive law that has been and continues to be developed by the federal courts under those two federal criminal statutes to determine whether the alleged predicate acts in fact occurred. *See, e.g., In re Lewisville Properties*, 849 F.2d 946, 951 (5th Cir. 1988); *Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 195-96 (9th Cir. 1987).

decide the parameters of the federal criminal laws in the first instance. A finding of concurrent jurisdiction would eviscerate the fundamental purpose of 18 U.S.C. § 3231 and alter the manner and method by which the federal criminal laws are interpreted and expounded. Absent an explicit Congressional directive, this Court should not interpret RICO in a manner which fundamentally changes the nature of our federal system.

2. Concurrent State-Court Jurisdiction Would Lead To Increased Conflict And Inconsistency In The Interpretation Of RICO.

Since the predicate acts which comprise a pattern of racketeering activity "will often occur in several States," *Malley-Duff*, 483 U.S. at 154, concurrent state-court jurisdiction would increase the risk of inconsistent adjudications in cases brought in different states by different plaintiffs, since:

> [s]tate courts have no multi-district litigation panel and no way to make their decisions on federal law consistent except through review by the Supreme Court. State court jurisdiction over the complex and ambiguous RICO statute would create the possibility of conflicting interpretations not only in the 12 regional federal courts of appeals but also in 50 states.

Chivas Products, 864 F.2d at 1285.[23]

Even among the federal courts, RICO has led to conflicting results in a number of areas. In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951 (U.S. June 26, 1989), this Court was called upon to construe RICO's "pattern" requirement. The Court noted that the "plethora of different views" on the issue by the federal courts of appeals had demonstrated that "developing a meaningful concept of 'pattern' within the existing

23. In addition, most states have intermediate appellate courts, as well as courts of last resort. Often these intermediate courts have various divisions, and each division may not be bound by the decision of any other division. Accordingly, the potential for conflicting interpretations is even greater than that anticipated by the court in *Chivas Products*.

statutory framework has proved to be no easy task." 57 U.S.L.W. at 4952. Both the majority and the concurring Justices in *H.J. Inc.* expressed their concern with the lack of uniformity in civil RICO jurisprudence among the federal courts of appeals. *See id.*; *see also* 57 U.S.L.W. at 4957 (Scalia, J., concurring) (referring to "kaleidoscope of circuit positions").

Moreover, as Justice Scalia, writing the concurring opinion in *H.J. Inc.*, recognized, not only are "clarity and predictability in RICO's civil applications particularly important," but, in light of RICO's criminal aspects, even "its civil applications [must] possess the degree of certainty required for criminal laws." 57 U.S.L.W. at 4957-58 (Scalia, J., concurring).

The probability that concurrent state-court jurisdiction will result in an increased lack of uniformity of decision is increased by the number of unresolved issues that remain under RICO, including the application of the test for a "pattern" of racketeering activity set forth in *H.J. Inc.*; whether a RICO defendant can also be a RICO "enterprise" under sections 1962(a)[24] and 1962(c);[25] when a claim accrues under RICO for purposes of the statute of limitations;[26] and whether section 1962(a) requires that

24. *Compare, e.g., United Energy Owners Committee v. United States Energy Management Systems*, 837 F.2d 356, 364 (9th Cir. 1988) *and Masi v. Ford City Bank & Trust Co.*, 779 F.2d 397, 401-02 (7th Cir. 1985) (both holding that a RICO defendant can also be the "enterprise" under section 1962(a)) *with United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190-91 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983) *and Rush v. Oppenheimer & Co.*, 628 F. Supp. 1188, 1196-98 (S.D.N.Y. 1985) (defendant cannot also be "enterprise" under section 1962(a)).

25. *Compare, e.g., B. F. Hirsch v. Enright Refining Co.*, 751 F.2d 628, 633-34 (3d Cir. 1984) (defendant must be separate from "enterprise" under section 1962(c)) *with United States v. Hartley*, 678 F.2d 961, 988-89 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170, 1183 (1983) (corporation may be simultaneously a defendant and the "enterprise" under section 1962(c)).

26. *Compare, e.g., Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988) (limitation period accrues when plaintiff has actual or constructive knowledge of acts causing injury) *with Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1103 (2d Cir. 1988) (action accrues when plaintiff knows or should know of existence of injury), *cert. denied*, 109 S. Ct. 1642, 1643 (1989) *and Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987) (same) *with Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130-33 (3d Cir. 1988) (action accrues from date plaintiff knew or should have known of last injury or last predicate act) *and Gilbert Family Partnership v. Nido Corp.*, 679 F. Supp. 679, 686 (E.D. Mich. 1988) (utilizing Clayton Act accrual rule).

an alleged injury be suffered as a result of the investment of proceeds of racketeering activity rather than by an underlying predicate act.[27]

Moreover, concurrent state-court jurisdiction would lead to increased forum-shopping and potentially greater docket congestion in both federal and state courts. For example, if a putative RICO plaintiff resides in a state in which the relevant decisions of state courts in that jurisdiction are contrary to decisions of federal courts in that district or circuit, the plaintiff could shop for the most desirable forum. *Cf. Malley-Duff*, 483 U.S. at 154 (discussing desirability of uniform federal statute of limitations to prevent the "danger of forum shopping"). In addition, if the plaintiff's claim is predicated in part upon an alleged violation of the Securities Exchange Act of 1934, under which jurisdiction is exclusively federal, the plaintiff might bring a RICO action in the more favorable state court and at the same time bring a separate action in federal court for the alleged securities violation, which would not be cognizable as a separate claim in the state court.[28]

27. *Compare, e.g., Rose v. Bartle*, 871 F.2d 331, 357-58 (3d Cir. 1989) (injury under section 1962(a) must have been caused by use or investment of income in RICO enterprise) *with Mid-State Fertilizer Co. v. Exchange National Bank of Chicago*, 693 F. Supp. 666, 671-72 (N.D. Ill. 1988), *aff'd*, No. 88-2532 (7th Cir. June 19, 1989) *and Smith v. MCI Telecommunications Corp.*, 678 F. Supp. 823, 827-28 (D. Kan. 1987) (injury resulting from predicate acts rather than investment of racketeering proceeds is sufficient under section 1962(a)).

28. Moreover, contrary to the claims made by some courts, concurrent jurisdiction would not be likely to have an appreciable effect upon federal court dockets. Most of the RICO cases filed in federal courts have an independent basis of federal subject-matter jurisdiction, such as alleged securities fraud or diversity. *See* Blakey and Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White Collar Crime?* 62 Notre Dame L. Rev. 526, 534 n.29 (1987). In addition, most of the RICO claims filed in state courts could be removed to federal courts, 28 U.S.C. § 1441, thus further vitiating any

3. RICO's Procedural Mechanisms Are Incompatible With Concurrent State-Court Jurisdiction.

The broad procedural mechanisms contained in section 1965 of RICO, which provide, *inter alia*, for extended venue and service of process, are applicable only in federal court litigation. 18 U.S.C. § 1965. For example, section 1965(a) provides for venue "in the district court of the United States for any district" in which a defendant "resides, is found, has an agent, or transacts his affairs." Section 1965(b) empowers a federal court, in appropriate circumstances, to authorize process to be served in any judicial district of the United States. Section 1965(c) authorizes the service of subpenas to compel the attendance of witnesses "in the district court of the United States for any judicial district" in civil or criminal actions instituted by the United States. Finally, section 1965(d) provides that "[a]ll other process in any action or proceeding under [RICO] may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs."

In developing the overall statutory scheme, Congress granted to the federal courts these expanded powers, which provide those courts with enhanced ability to carry out RICO's statutory purposes, but which are non-existent in state courts. Consequently, concurrent jurisdiction over civil RICO claims would defeat the broad remedial purposes of the statute.[29] As the Court of Appeals for the Sixth Circuit has noted:

NOTES *(Continued)*

perceived benefit to federal court dockets by permitting concurrent state-court jurisdiction.

29. Congress has mandated that RICO be "liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970). However, to construe this mandate of liberal construction to require that civil RICO actions be permitted in state courts, as some courts have done, would turn the mandate on its head, because of the many procedural mechanisms designed to further RICO's remedial purposes which are completely unavailable in state courts. *See Chivas Products*, 864 F.2d at 1280; *cf. Brandenburg*, 859 F.2d at 1194; *Lou*, 834 F.2d at 737; *Cianci*, 40 Cal.3d at 916; *Simpson Electric*, 72 N.Y.2d at 458.

> [C]onsideration of [these] unique features of the RICO definitional and remedial structure demonstrates convincingly that state court jurisdiction would obstruct strong federal interests in uniform substantive and procedural enforcement of this integrated statutory scheme to control organized crime affecting interstate commerce.

Chivas Products, 864 F.2d at 1286.[30]

Under RICO, only the federal courts have sufficient procedural power to implement the purposes and objectives of the statute. Accordingly, concurrent state-court jurisdiction is not only incompatible with RICO's purposes, but would also impede the realization of those purposes by permitting suits in forums that are unable to implement fully the statutory scheme.

IV. RICO PRESENTS THE MOST COMPELLING CASE TO DATE FOR A FINDING OF EXCLUSIVE JURISDICTION.

As discussed above, an unbroken line of cases dating to *Claflin v. Houseman* has held that exclusive jurisdiction in the federal courts over a cause of action created by Congress will be found when Congress has expressed its intent either explicitly or implicitly that the statute in question be adjudicated in the federal courts, or when the federal interests underlying the statute are incompatible with the exercise of concurrent jurisdiction by the state courts. In each of the recent cases which have reached this Court with respect to the issue of exclusive federal jurisdiction, neither of these factors was present.

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30. In *Brandenburg*, the court dismissed an argument based upon the exclusively federal venue and process provisions with the statement that "state courts retain the authority to promulgate procedural rules for their own courts, subject only to constitutional limitations." 859 F.2d at 1194. The Constitutional limitations to which the *Brandenburg* court adverted, however, including the requirement of due process, preclude the enactment by state courts of extensive venue and process provisions similar to those legislated by Congress in RICO pursuant to the Commerce Clause, U.S. Const. Art. I, § 8. Thus, state courts cannot properly effectuate Congress' intent to implement RICO's remedial scheme through the provision of such broad procedural tools.

In *Charles Dowd* and *Gulf Offshore, supra*, the Court concluded that Congress had expressed not a clear intent to oust the state courts from jurisdiction, but instead a contrary intention to expand the number of forums open and available to potential litigants in labor disputes and state law claims arising on the outer continental shelf. In view of this express Congressional intent, it would have been incongruous to hold in those cases that Congress had impliedly ousted the state courts of jurisdiction. In addition, the substantive rights at issue were historically and traditionally within the competence of the state courts.[31] In each case, a clear Congressional intent *against* exclusive jurisdiction was evident and Congress had acted to make the statutes in issue *compatible*, rather than incompatible, with state court jurisdiction.

RICO, in stark contrast, presents the very case, which this Court anticipated in *Claflin*, of a statute whose legislative history and express purpose demonstrate that Congress has committed it to the exclusive jurisdiction of the federal courts. The legislative history of RICO and the precedents of this Court establish that RICO was modeled on the Clayton Act. It is hornbook law that there is exclusive jurisdiction over the Clayton Act in the federal courts; thus, Congressional intent with respect to RICO unmistakably points to exclusive jurisdiction in the federal courts. In addition, the foregoing discussion has demonstrated the myriad difficulties, inconsistencies and incompatibilities which would arise if RICO were held to be within the concurrent jurisdiction of the state courts. In short, RICO is not a statute in which Congress has demonstrated an intention to confer or preserve state-court jurisdiction; nor is it a statute with which state-court jurisdiction is compatible. *See Gulf Offshore*

31. As explained above, older cases in which *Claflin* was applied involved similar situations. *See Second Employers' Liability Cases*, 223 U.S. 1 (1912), and *Missouri ex rel. St. Louis, Brownsville & Mexico Ry. v. Taylor*, 266 U.S. 200 (1924), in which the Court held that Congress created causes of action based on principles of common law negligence to benefit specific classes of persons, including shippers or employees on common carriers in interstate commerce.

and *Charles Dowd*. Rather, RICO is a statute in which both of the *Claflin* tests for exclusive jurisdiction are squarely met.

As a consequence, this Court should conclude that civil actions under RICO are within the exclusive jurisdiction of the federal courts and, because the contrary conclusion was the basis for the decision of the court below, the judgment of the Court of Appeals should be reversed.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the Court of Appeals, order the Amended Complaints reinstated, and remand the matter for further proceedings consistent with its opinion.

Respectfully submitted,

M. Norman Goldberger

M. Norman Goldberger
Brian P. Flaherty
*Gary L. Leshko
WOLF, BLOCK, SCHORR
AND SOLIS-COHEN
Twelfth Floor,
Packard Building
15th and Chestnut Streets
Philadelphia, PA 19102-2678
(215) 977-2000

Counsel for Petitioners

**Counsel of Record*

Of Counsel:

Lawrence I. Weisman
306A Hampton Plaza
300 E. Joppa Road
Towson, Maryland 20204
(301) 583-9030

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RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

§ 1961. Definitions

As used in this chapter –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in

property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which

occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the

investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both., , and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—
(A) interest in;
(B) security of;
(C) claim against; or
(D) property or contractual right of any kind affording a source of influence over;
any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forefeiture under this section includes—

(1) real property including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (*l*) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1). Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the

interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of

innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisons of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for

violations of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be peformed under this chapter by the Attorney General.

(i) Except as provided in subsection (*l*), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the Unted States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(*l*)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceedings brought by the United States.

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings

may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the

United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)(1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of—

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation,

the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the

introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such material all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal

place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

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QUESTION PRESENTED

Whether the state courts have been divested of their presumptive jurisdiction to hear civil claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68, by "an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between the state-court jurisdiction and federal interests." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1650

FRANCINE TAFFLIN, *et al.*,
Petitioners,

v.

JEFFREY A. LEVITT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS

COUNTERSTATEMENT

This case arises out of "Maryland's savings and loan crisis, the steps taken by the Governor of Maryland and the General Assembly of Maryland to meet it, and the implementation of the legislative scheme by the designation of a single judge of the Circuit Court for Baltimore City to adjudicate all claims arising out of the conservator/receivership proceedings for failed savings and loan associations . . . ." (Pet. App. A-4—A-5.) [1] The Fourth Circuit discussed the factual background of the litigation in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988), a related case upon which it relied in concluding that the facts of this case presented a compelling case for federal

---

[1] All citations to the Appendix to the Petition ("Pet. App.") are to the opinions below.

court abstention. We can do no better than reproduce the Fourth Circuit's account as set forth in *Brandenburg*:

"The Maryland Savings-Share Insurance Corporation (MSSIC) was a quasi-public non-profit corporation established by the Maryland legislature in 1962 to insure accounts in state-chartered savings and loan associations. MSSIC was given substantial regulatory control over its member institutions, which by 1985 numbered approximately 100. In May 1985, rumors of financial instability at two savings and loans insured by MSSIC—Old Court and Merritt—triggered a general run on MSSIC-insured thrifts. The resulting panic threw MSSIC itself into financial peril and threatened to lead to the collapse of the state's savings and loan industry. In response, the Governor of Maryland declared a state of public crisis, issued an Executive Order limiting withdrawals from all MSSIC-insured institutions to a maximum of $1,000 per account per month, and called the Maryland General Assembly into emergency session. In special sessions held in May and October-November of 1985, the General Assembly passed a package of legislation designed to deal comprehensively with the crisis in the state's savings and loan industry. . . .

"This legislative effort had two principal components. First was the creation of a state-operated deposit insurance fund, the Maryland Deposit Insurance Fund (MDIF), to replace the ruined MSSIC. MDIF was given all of MSSIC's powers, duties, and responsibilities and assumed all of its assets and liabilities, including its insurance obligations to depositors at member institutions. Second . . . was the establishment of a comprehensive framework for the administration of conservatorship and receivership proceedings for insolvent savings and loan associations. *See* Md. Fin. Inst. Code Ann. §§ 9-701 to 9-712. Section 9-709 gave MDIF the right to be appointed conservator or receiver of any savings and loan association insured by it. Section 9-710 gave the state

court administering the conservatorship or receivership of such an institution 'exclusive and plenary jurisdiction over all claims, actions, and proceedings that are brought by any person and that are related to the assets, property, powers, rights, privileges, duties and liabilities' of that institution or of MDIF in its capacity as conservator or receiver. To implement this comprehensive scheme, the Maryland Court of Appeals appointed a single judge . . . to adjudicate all claims arising out of the conservatorship/receivership proceedings for the failed savings and loan associations." 859 F.2d at 1181-82 (citations and footnotes omitted).

In accordance with the framework for addressing the crisis established by the Maryland legislature, Old Court Savings & Loan, Inc., was placed in receivership, with the state agency, MDIF, acting as receiver. As receiver, MDIF brought state court actions against each of the defendants below, respondents here, "alleging misdeeds closely paralleling those alleged in the instant case." (Pet. App. A-5.) In these state court actions, MDIF sought to recover from potentially liable and responsible parties sums that ultimately would be distributed through MDIF to reimburse Old Court's depositors, including petitioners. *See Brandenburg*, 859 F.2d at 1192. Through MDIF, the State of Maryland has assured all depositors, including petitioners, that it will repay the entire principal amount of their accounts, up to the insured limit of $100,000 per account. MDIF has announced, however, that Old Court depositors will not be compensated for interest accruing after November 8, 1985, and that interest for the period May 13 to November 8, 1985, will be paid only at reduced rates. (Pet. App. A-5.) Petitioners' damage claims are based on this reduction of interest on their deposits.

Notwithstanding the state's systematic efforts to address the crisis, petitioners filed these actions in federal court on January 7, 1986, asserting, among other claims, a claim under the Racketeer Influenced and Corrupt

Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq.* Petitioners named as defendants the former officers and directors of Old Court, the former officers and directors of MSSIC, the law firm of Venable, Baetjer & Howard (counsel to MSSIC and Old Court), Old Court's accounting firm, and MDIF itself.[2] (Pet. App. A-4.)

The district court granted defendants' motions to dismiss, holding that it should abstain from reaching petitioners' RICO claims in deference to the state court proceedings.[3] The district court concluded that state courts presumptively possess jurisdiction over federal claims, and that "the RICO claims in the present suit are essentially state fraud claims," which the state courts were fully qualified to handle. (Pet. App. A-28.) The district court reasoned that the state courts were in a position comprehensively to address all of petitioners' claims:

> In the present case MDIF, Old Court's receiver, in accordance with the emergency legislation, has brought law suits in state court against the directors of Old Court and more recently against the former directors of MSSIC. Thus, a large number of Defendants in this case are Defendants in the state court suits filed by MDIF. If the Plaintiffs are allowed to proceed in this action, they will have circumvented the receivership process. Moreover, any money awarded to Plaintiffs would potentially reduce the available funds to satisfy a judgment in favor of depositors in the receiver proceeding.

(Pet. App. A-26 - A-27.)

[2] At an early stage of the action, MDIF was dismissed as a defendant by the district court on Eleventh Amendment grounds. (Pet. App. A-4.) MDIF nevertheless retains a significant interest in this case to the extent the case involves claims against Old Court, which is under MDIF's receivership, and against MSSIC, MDIF's predecessor.

[3] Petitioners also asserted a claim under Section 10b of the Securities Exchange Act, 15 U.S.C. § 78j(b). The district court, following *Marine Bank v. Weaver*, 455 U.S. 551 (1982), dismissed that claim on the ground that the certificates of deposit upon which plaintiffs premised their Exchange Act claim were not a form of "security" covered by that Act. (Pet. App. A-24.) The Fourth Circuit affirmed this dismissal (Pet. App. A-6—A-9), and this Court subsequently denied certiorari on the issue.

The Court of Appeals affirmed. The court relied on its prior decision in *Brandenburg* in holding (1) that the state court would have jurisdiction over the RICO claims and (2) that Maryland's " 'comprehensive scheme for the rehabilitation and liquidation of insolvent state-chartered savings and loan associations' . . . provided a proper basis for the district court to abstain under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)." (Pet. App. A-10, *quoting Brandenburg*, 859 F.2d at 1191.)

In *Brandenburg*, the Court of Appeals had concluded that to allow a parallel federal court action to proceed would undermine the state courts' efforts to achieve a fair and equitable distribution of limited savings and loan assets in two ways: *First*, it would interfere with MDIF's efforts "to marshal the institution's assets for distribution to its depositors and other creditors according to the statutory priority scheme . . . . Allowing the plaintiffs to proceed with this action would permit them to circumvent that statutory distribution scheme by reaching assets of [the association] in the hands of third parties, before the receiver can recover them for the institution's estate." 859 F.2d at 1191-92. *Second*, the federal action would undermine the orders issued by the state receivership court. Because the damages claimed in the federal action consist of interest which the receivership court relieved the savings and loan of the obligation to repay, the "action is thus in effect a collateral attack on the interest-freezing orders issued by the state receivership court . . . ." *Id.* at 92.

On the question whether the state courts could hear petitioners' RICO claims, *Brandenburg* relied upon "the well-established presumption that state courts may assume jurisdiction over cases arising under federal law." 859 F.2d at 1193. That presumption could only be "re-

butted in three ways: 'by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.'" *Id.*, *quoting Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981). The court analyzed each of these factors with respect to RICO and concluded that "the state and federal courts share concurrent jurisdiction over civil RICO claims." *Id.* at 1195.[4]

This Court granted certiorari limited to the question of whether state courts may hear civil RICO claims.

SUMMARY OF ARGUMENT

The concurrent sovereignty of the states, subject only to the limitations imposed by the Supremacy Clause, is a cornerstone of our federal system. Within this system, state courts possess inherent authority to hear federal claims. The question of concurrent jurisdiction, therefore, is not whether Congress has affirmatively granted jurisdiction to the state courts—for the general jurisdiction of the state courts is not defined by Congress, but by their own legislatures. The question is whether Congress has exercised its power to eliminate that jurisdiction. Except in an extremely limited class of cases, where concerns of federal sovereignty dominate, only Congress can

[4] At the time the decision below was rendered, the federal appellate courts and the highest state courts that had considered the issue were unanimous in holding that state courts are competent to hear civil RICO claims. *See Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987); *Simpson Elec. Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450, 530 N.E.2d 860, 534 N.Y.S.2d 152 (1988); *Rice v. Janovich*, 109 Wash.2d 48, 742 P.2d 1230 (1987); *Cianci v. Superior Court*, 40 Cal.3d 903, 710 P.2d 375, 221 Cal. Rptr. 575 (1985). *See also County of Cook v. MidCon Corp.*, 773 F.2d 892 (7th Cir. 1985) (suggesting in dicta that RICO jurisdiction is concurrent). Following the decision below, the Sixth Circuit rendered its decision in *Chivas Products Ltd. v. Owen*, 864 F.2d 1280 (6th Cir. 1988), reaching a contrary result and creating a conflict in the circuits.

divest the state courts of their inherent authority over federal claims.

In *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981), this Court, following a consistent line of cases, including *Claflin v. Houseman*, 93 U.S. 130 (1876), and *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), held that "the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." None of these factors is present with respect to civil claims arising under RICO.

First, as all courts that have considered the issue have agreed, and as petitioners concede, the text of RICO, which provides merely that private actions "may" be prosecuted in the federal courts, does nothing to divest the state courts of jurisdiction. "[I]t is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from jurisdiction over the cause of action." *Gulf Offshore*, 453 U.S. at 479 (citation omitted).

Second, as all courts that have considered the issue have also agreed, RICO's legislative history contains no indication that Congress even considered eliminating state court jurisdiction over RICO claims, much less that Congress affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts. Since it requires an affirmative act of Congress to withdraw jurisdiction from the state courts, Congress' failure to consider the issue is conclusive. Contrary to petitioners' suggestion, this Court has no role to play in assessing what Congress "would have" intended had it thought about the issue.

Finally, nothing in either the nature or the underlying policies of civil RICO actions is incompatible with state court jurisdiction. "Incompatibility" has generally been limited to situations where state court jurisdiction

over the federal claim would undermine federal sovereignty in one of two specific ways. Incompatibility may arise from principles of federal sovereign immunity when the United States or one of its agents is called upon to account for its actions in a state court. Alternatively, incompatibility may be found where state court jurisdiction presents a direct conflict with the structure of a federal statutory scheme (as when Congress assigns the administration of a federal law to a specialized tribunal). Neither consideration is present with respect to RICO. On the contrary, concurrent jurisdiction is particularly appropriate for RICO claims. RICO's underlying structure incorporates and supplements state law, and RICO's broad remedial purposes would be promoted by providing alternative fora in which persons injured by racketeering activity may bring their claims for damages.

Neither do the more general policy arguments urged by petitioners—concerning the desirability of uniformity of decision and the asserted unfamiliarity of state judges with the federal crimes comprising some of RICO's predicate acts—suggest any "disabling incompatibility" between RICO and state court adjudication. *First*, the desirability of uniformity of decision is no greater with respect to RICO than it is for any other federal statute. Nothing in RICO's text, structure, or legislative history suggests that there is anything special about RICO in this regard. *Second*, the fact that civil RICO incorporates standards from federal criminal law does not render state courts incompetent to hear civil RICO claims. It is no more anomalous for state courts to interpret RICO's federal law predicate acts than it is for federal courts to interpret RICO's state law predicate acts. *Third*, it would be wholly incongruous to hold that RICO claims cannot be pursued in state court but can be pursued before arbitral panels as this Court recently held in *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2345 (1987). Far from being "inimical" to state court jurisdiction, RICO's purposes are promoted by allowing state courts to hear civil claims brought under the Act.

ARGUMENT

I. STATE COURTS POSSESS INHERENT POWER TO ADJUDICATE FEDERAL CLAIMS UNLESS (1) CONGRESS ACTS TO STRIP THEM OF THAT JURISDICTION, OR (2) THERE IS SOME DISABLING INCOMPATIBILITY BETWEEN THE FEDERAL CLAIM AND STATE COURT ADJUDICATION.

A. State Courts Possess Inherent Authority To Adjudicate Federal Claims.

As an incident to the power granted to them by their own constitutions and legislatures, state courts of general jurisdiction have the authority to adjudicate claims arising under the laws of another sovereign. Each state has "complete and exclusive jurisdiction by its judicial tribunals over all legal questions, of whatsoever nature, capable of judicial determination, and involved in any case within its limits between parties over whom it could exercise jurisdiction." *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 517 (1898). Since before the adoption of the Constitution, state courts have been empowered to adjudicate claims arising under foreign law as well as claims arising under local law. Thus, state courts are presumptively as competent to adjudicate claims arising under the laws of the United States—the law of a superior sovereign—as they are to adjudicate claims arising under the laws of Japan, Brazil or Saudi Arabia.[5]

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[5] There is nothing obscure about this principle:

> Since 1789, rights derived from federal law could be enforced in state courts unless Congress confined their enforcement to the federal courts. This has been so precisely for the same reason that rights created by the British Parliament or the Legislature of Vermont could be enforced in New York courts. Neither Congress nor the British Parliament nor the Vermont Legislature has power to confer jurisdiction upon the New York courts. But the jurisdiction conferred upon them by the only authority that has jurisdiction upon them—namely the lawmaking power of the State of New York—enables them

1. It was no part of the constitutional plan to alter this fundamental aspect of state sovereignty. The grant of power to the federal government to establish a federal judiciary did not imply any limitation on the power of the states to define the jurisdiction of their own courts. "Nothing more was done by the Constitution than to extend the judicial power of the United States to specified cases and controversies; leaving to Congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies, or should only exercise jurisdiction concurrent with the courts of the several States." *Plaquemines*, 170 U.S. at 517. To be sure, the Supremacy Clause requires the ultimate precedence of the federal Constitution and federal law. But "nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law." *Dowd Box*, 368 U.S. at 507.

2. The presumptive jurisdiction of state courts over federal claims is confirmed by the fact that Article III did not require the establishment of federal trial courts. Rather than mandate inferior federal courts, the Framers let Congress decide whether and to what extent to vest the federal judicial power in a federal judiciary. This fact reflected the Framers' view of the state courts as the principal, or at least ordinary, tribunals for the adjudication of federal rights. Thus, the premise of the Framers' determination that federal courts were not to be required was that, should Congress create a federal right, "the state courts stand ready to vindicate the federal right . . . ." *Gulf Offshore*, 453 U.S. at 478 n.4.

3. This basic understanding of the state courts' inherent authority to adjudicate federal claims was concisely

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to enforce rights no matter what the legislative source of the right may be.

Brown v. Gerdes, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring).

described by Alexander Hamilton in *The Federalist No. 82*. In terms that have been reflected in this Court's own repeated reaffirmations of the principle, Hamilton asserted that

> in every case in which [state courts] were not excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When in addition to this we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as part of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.

Id. at 536 (Modern Library ed. 1937). Over a span of two centuries, this Court has adhered to Hamilton's statement of the rule of concurrent state court jurisdiction. *See, e.g., Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 25-26 (1820) ("in every case in which the state tribunals should not be expressly excluded by the acts of the national legislature, they would, of course, take cognisance of the causes to which those acts might give birth"); *Claflin*, 93 U.S. at 136 ("if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it"); *Dowd Box*, 368 U.S. at 507-08; *Gulf Offshore*, 453 U.S. at 477-78.

In sum, state courts do *not* depend upon an affirmative grant of authority from Congress in order to hear fed-

eral claims. On the contrary, state courts possess the inherent authority to hear such claims as long as their own state constitution and state legislature grant them such power. *Claflin*, 93 U.S. at 136-37.[6]

B. The Supremacy Clause Grants Congress The Ability To Oust The State Courts Of Their Jurisdiction And Defines The Limited Contexts In Which State Court Jurisdiction May Be Incompatible With A Federal Claim.

1. The Supremacy Clause confirms the prerogative of the state courts to decide questions involving federal rights. In binding "The Judges of every State" to the supremacy of federal law, the Framers clearly contemplated that state courts would enforce rights derived from federal law. The Supremacy Clause specifies that federal law is to be regarded as not *merely* the law of another sovereign, but of a higher sovereign. Therefore, while state courts, possessing jurisdiction to entertain claims based on Japanese, English, or Saudi law, are free to reject foreign law when it conflicts with the law or policy of the state itself, the state courts are bound to apply federal law "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (Art. VI, § 2).

2. The Supremacy Clause also suggests the limited circumstances in which the state courts may *not* hear federal claims. The Supremacy Clause provides the mechanism through which Congress may, by affirmative enactment, oust the state courts of jurisdiction over a given federal claim.[7] Thus, it has long been acknowledged

[6] This case presents no issue about the ability of the states to *decline* to exercise jurisdiction over federal claims or of the power of Congress to *compel* them to entertain such claims.

[7] Of course, the ultimate source of Congress' power to limit the jurisdiction of the state courts might be found in Congress' authority "[t]o make all laws which shall be necessary and proper for carrying into execution" its enumerated powers. *See Tennessee v. Davis*, 100 U.S. 257, 263-64 (1880). Nevertheless, it is by virtue of the Supremacy Clause that state courts must heed any such jurisdictional limitation over federal law claims. *See Claflin*, 93 U.S. at 137.

that "Congress may, if it see[s] fit, give to the Federal courts exclusive jurisdiction." *Claflin*, 93 U.S. at 137 (citations omitted). *See also Houston v. Moore*, 18 U.S. (5 Wheat.) at 25-26. Indeed, from the outset of the Republic, Congress has carefully prescribed that some of the jurisdiction in the lower federal courts be "exclusive[] of the courts of the several States" (*see* Act of Sept. 24, 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76, 78), knowing full well the language to use when it seeks to vest exclusive jurisdiction in the federal courts. *See, e.g.*, 28 U.S.C. §§ 1333, 1338(a), 1346(b), 1351, 1355, 1356; 15 U.S.C. § 78aa; 18 U.S.C. § 3231; 40 U.S.C. § 270b(b). Accordingly, this Court has held that state courts are divested of jurisdiction over a federal claim where Congress has made such an intention clear, by either "an explicit statutory directive" or an "unmistakable implication from legislative history." *Gulf Offshore*, 453 U.S. at 478.

3. Beyond empowering Congress to pass a law barring the state courts from assuming jurisdiction over a federal claim, the Supremacy Clause suggests two additional, albeit narrow, situations in which the state courts may not hear a federal claim. *First*, where the state courts' exercise of jurisdiction over the federal claim would effectively subject the federal government itself to the jurisdiction of the state courts, that assertion of jurisdiction would appear to be an affront to federal sovereignty and sovereign immunity. In that circumstance, the National government's own sovereign immunity (and the historic principle that a superior sovereign cannot be dragged unwillingly before the courts of a subordinate government) provide a narrow exception to the rule that the states have presumptive jurisdiction over *all* federal

claims. *Second*, under the Supremacy Clause, the states have no power to take any action that conflicts with or frustrates the implementation of a federal statute. Thus, in those rare instances where the mere exercise of jurisdiction by the state courts, even though applying the same substantive law, would defeat the purposes of some carefully crafted remedial mechanism for the expert, expedited, or focused adjudication of federal rights, the exercise of state court jurisdiction could properly be said to be inconsistent with the federal right. In these limited contexts, this Court has recognized that there may exist a "disabling incompatibility between the federal claim and state-court adjudication." *Gulf Offshore*, 453 U.S. at 477-78. *See also Dowd Box*, 368 U.S. at 507-08; *Claflin*, 93 U.S. at 136.

II. CONGRESS HAS NOT OUSTED THE STATE COURTS OF JURISDICTION OVER RICO CLAIMS.

There is no dispute about the appropriate standard for deciding the question presented by this case: petitioners agree (Pet. Br. 10) that the state courts can be divested of jurisdiction over RICO only "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Gulf Offshore*, 453 U.S. at 478, *citing Dowd Box*, 368 U.S. at 507-08, *Claflin*, 93 U.S. at 137. Yet, while petitioners acknowledge these standards, in their application petitioners tend to forget their provenance. Thus, petitioners proceed as if this Court were free to impute purposes to Congress that Congress never expressed, or to impose upon the resolution of the instant issue any number of asserted federal policies bearing little or no relationship to the statute in question. Petitioners' policy-oriented approach would undermine the historical rationale for the principle of concurrent jurisdiction.

The "presumption" of concurrent jurisdiction to which the cases of this Court refer is *not* a mere presumption

of policy. To illustrate: Where a statute is silent with respect to some issue that arises in the course of its administration, then the courts may be called upon to fill in the gaps that Congress left in the statute. It may be proper, in that circumstance, for a court to ask what Congress would have done had it considered the issue. In answering that question, the courts might employ a presumption—reflecting some overriding consideration of policy—that provides a guide to the presumed intention of Congress in enacting a statute.[8]

But the "presumption" of concurrent jurisdiction is built upon more than a constitutional "policy" of respect for the state courts. It states a juridical fact: under our federal system, the state courts possess jurisdiction over federal claims, unless and until Congress acts to take it away. Only where Congress has enacted some law directed to that purpose can it properly be said that the state courts have been stripped of their inherent authority. The issue for the Court is not, therefore, what Congress would have done had it considered the question, but only what Congress did: Did it pass a law changing the *status quo*, ousting the state courts of their existing jurisdiction? In answering that question, the Court should not lightly infer that Congress has acted to deprive the states of a fundamental sovereign authority that the Framers carefully left undisturbed.

Similarly, in determining whether there is some "disabling incompatibility" between state court jurisdiction and the achievement of a federal statute's goals, it is only proper to bear in mind the constitutional source of the "incompatibility" rule. Only where it can fairly be said that the Constitution, through the Supremacy Clause,

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[8] For example, where a statute does not contain a statute of limitations, the Court may make reference to the policy against stale claims and presume that Congress intended the federal courts to supply a limitations period. *See Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143 (1987).

compels such a result, may a finding of incompatibility be made. The issue is not one of policy for this Court to weigh. "Disabling incompatibility" exists only where state court jurisdiction undermines the superior sovereignty of the federal government or frustrates the remedial provisions of a federal statute.

A. The Statute States No Bar To State Court Jurisdiction Over RICO.

Petitioners concede, as they must, that there is nothing in the language of RICO—much less "an explicit statutory directive" (*Gulf Offshore*, 453 U.S. at 478)—to suggest that Congress has, by affirmative enactment, divested the state courts of the power to adjudicate claims under the Act. (*See* Pet. Br. 10.) Because Congress could so easily have used words that would clearly communicate its intention to vest jurisdiction exclusively in the federal courts,[9] the absence of language expressly divesting the state courts of jurisdiction is nearly dispositive of this case.

RICO grants "any person" injured by a violation of its substantive provisions the right to bring an action in the federal courts: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter *may sue* therefor in any appropriate United States district court . . . ." 18 U.S.C. § 1964(c) (emphasis added). Such language "provides that suits of the kind described 'may' be brought in the federal district courts, not that they must be." *Dowd Box*, 368 U.S. at 506. This Court has repeatedly held that a statute that uses the word "may" in conferring jurisdiction of a federal claim on a federal court "does not state or even suggest that such jurisdiction shall be exclusive." *Id.* at 506. *See Gulf Offshore*, 453 U.S. at 479 ("It is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action"); *United States v. Bank of New York Co.*, 296 U.S. 463, 479 (1936).

[9] Congress is well aware, of course, of the language that it can use in a statute to divest the state courts of jurisdiction: Nothing more is required than to say that "the district courts of the United States shall have exclusive jurisdiction over all civil actions arising under" the statute. Congress has used this or similar language on scores of occasions both before and after its enactment of RICO. *See* page 13 *supra*.

To suggest that a permissive grant of jurisdiction to the federal courts should divest the jurisdiction of the state courts is to "disregard th[e] consistent history of hospitable acceptance of concurrent jurisdiction" by this Court. *Dowd Box*, 368 U.S. at 508. If Congress is to revoke state court jurisdiction, it must use words that do more than merely permit a claim to be brought in federal court. Like § 301(a) of the Labor Management Relations Act at issue in *Dowd Box*, or the jurisdictional provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(b), considered in *Gulf Offshore*, that is all the language of RICO § 1964(c) does.

B. RICO's Legislative History Provides No Indication That Congress Intended *Sub Silentio* To Deprive The State Courts Of Jurisdiction Over RICO Claims.

Although Congress can only strip the state courts of jurisdiction by affirmative enactment—a requirement that would seem to call for an "explicit statutory directive" (*Gulf Offshore*, 453 U.S. at 478)—the Court has allowed that Congress' intention to divest the state courts of jurisdiction may be shown by "unmistakable implication from legislative history" (*id.*), even where Congress has neglected to be "explicit." Although petitioners rely heavily on this theory, there is literally nothing in RICO's legislative history, let alone an "unmistakable implication," to support the conclusion that Congress intended to oust the state courts of jurisdiction over RICO.

1. Every court that has addressed this issue has concluded that RICO's "legislative history contains no indication that Congress ever expressly considered the question of concurrent jurisdiction." *Brandenburg*, 859 F.2d at 1193.[10] As Professor Blakey has confirmed, "'There is nothing on the face of the statute or in the legislative history' that touches on the question of concurrent jurisdiction . . . . 'To my knowledge, no one even thought of the issue.'" Flaherty, *Two States Lay Claim to RICO*, Nat. L.J., May 7, 1984, at 3, col. 2 (quoting Professor Blakey).[11]

2. The fact that Congress did not even *consider* the issue of state court jurisdiction over civil RICO claims should (absent some disabling incompatibility, *see* II.C *infra*) end the inquiry. It is not for the federal courts "to amend a statute so as to provide for circumstances that Congress has overlooked," (*Lou*, 834 F.2d at 736 n.4) especially where to do so would be to intrude not only upon the prerogative of Congress, but upon the prerogative of the states and their legislatures to define

[10] As the Ninth Circuit observed, "[t]he legislative history provides 'no evidence that Congress ever expressly considered the question of jurisdiction; indeed, the evidence establishes that its attention was focused solely on whether to provide a private right of action.'" *Lou*, 834 F.2d at 736, *quoting Cianci*, 710 F.2d at 379. *See also Chivas Products*, 864 F.2d at 1283.

[11] Professor Blakey was a staff member who played a role in drafting the legislation. A few courts have placed great reliance on his statement that while Congress never even thought of the issue whether jurisdiction over the private right of action should be exclusively federal, if Congress had thought of it, Congress would have concluded that it should be. *See, e.g., Greenview Trading v. Hershman & Leicher*, 489 N.Y.S.2d 502, 505 (App. Div. 1985). We know of no case, however, where this Court has relied on even the on-the-record, post-hoc statements of sitting Congressmen and Senators about what Congress would have done if it had thought of an issue. We feel certain that this Court has never relied on the post-hoc surmise of a congressional staff member, no matter how influential he may have been in the drafting process.

the jurisdiction of their courts as they see fit. This Court cannot enact a statute for Congress that Congress did not enact itself. Once it is conceded that Congress did not even think of the issue, then it is clear that Congress has not, *in fact*, enacted a statute that divests the state courts of jurisdiction over RICO claims. Put another way, it is precisely where a statute and its legislative history are silent that the presumption of state court jurisdiction should be determinative.

3. Not only does RICO's legislative history fail to evince an "unmistakable implication" that Congress intended to divest the state courts of jurisdiction, but to the extent the statute itself has anything to say on the issue, it buttresses a finding of concurrent jurisdiction. Congress expressly directed that RICO "be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970). This Court has emphasized that, "if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 492 n.10 (1985). These remedial purposes would be impeded by restricting the tribunals to which a RICO plaintiff may turn for relief. Congress intended to expand, not to limit, plaintiffs' remedial options.

4. This Court has not lightly inferred a congressional intent to deny jurisdiction to the state courts—even where the legislative history of a statute demonstrates Congress' concern that state courts might not properly adjudicate the federal rights at stake, and where there are strong indications that Congress had, in fact, specifically acted in a field in order to make a *federal* forum available to suitors. With what is now codified at 42 U.S.C. § 1983, Congress created a cause of action that is, arguably, uniquely federal in that it protects individuals from misconduct by state officials. The history of that enactment also shows a clear congressional focus on the

provision of a *federal* forum for the vindication of federal rights and grave concern about the willingness of the state courts properly to adjudicate federal rights. *See Mitchum v. Foster*, 407 U.S. 225, 239-42 (1972). Nonetheless, even in connection with that statute, this Court has refused to read the grant of a right to bring an action in federal court as a denial of jurisdiction to the state courts. *See Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980); *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980). On the basis of RICO's silent legislative record, it would be odd indeed to conclude that while Congress did not object to state court jurisdiction over Section 1983, it nonetheless intended to divest the state courts of jurisdiction over civil RICO.

5. Faced with silence both in the statute and its legislative history, petitioners argue that the similarity of § 1964(c) to Section 4 of the Clayton Act, 15 U.S.C. § 15(a), coupled with legislative history indicating that Congress modeled RICO's civil remedy after the Clayton Act's civil remedy provision, provides a sufficient basis for inferring that Congress intended jurisdiction over RICO claims to be exclusively federal. The mere modeling of one statute's remedial provisions after those of another statute does not imply, and certainly does not "unmistakably imply," that Congress intended actions brought under the later statute to be confined to the courts in which actions under the earlier statute are to be brought.

a. While the drafters of Section 1964(c) found precedent for RICO's treble damages and attorneys' fees provisions in the Clayton Act, the "mere borrowing of statutory language does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language." *Lou*, 834 F.2d at 737. As noted above, there is no evidence in the legislative history that Congress either considered or assumed that there were any *jurisdictional* implications associated with importing remedial language from the Clayton Act into RICO. This Court has never held that a mere similarity in language between two statutes is a sufficient indicator of congressional intent to overcome the bedrock rule of concurrent state court jurisdiction.[12]

It would be particularly inappropriate to draw such a drastic inference from the language of Section 1964(c), given how little consideration was afforded to the ramifications—jurisdictional and otherwise—of that section. The section was essentially an eleventh-hour addition to the statute, "was debated only briefly," and was described by Senator McClellan, the bill's co-sponsor, as a "minor change." *See* Note, *Clarifying a 'Pattern' of Confusion: A Multi-Factor Approach to Civil RICO's Pattern Requirement*, 86 Mich. L. Rev. 1745, 1767 (1988). Thus, as the Second Circuit has observed, "The most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible implications of section 1964(c)." *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 492 (1984), *rev'd*, 473 U.S. 479 (1985).

In fact, Congress was particularly concerned that its "modeling" might later be read to limit the scope of

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[12] Petitioners rely heavily upon *Cannon v. University of Chicago*, 441 U.S. 677 (1979), to support the dual propositions that Congress is presumptively aware of the existing judicial constructions of language from prior statutes, and that it intends to incorporate those interpretations when it uses similar language in a new statute. *Id.* at 694-99. However appropriate that fiction may be as an aid to statutory construction, it is inapplicable where, as here, there is a countervailing substantive rule, bottomed on fundamental constitutional premises, that Congress must act affirmatively in order to divest state courts of their jurisdiction over federal law claims.

Moreover, in *Cannon*, the Court drew upon explicit and extensive legislative history showing that Congress intended, *in fact*, for the construction of the later statute (Title IX) to follow that of the earlier (Title VI). *Id.* at 696 & n.19. As demonstrated below, Congress expressed no such intention with respect to RICO.

RICO's remedial aims.[13] In urging that RICO be liberally construed—a principle of construction that was ultimately enacted into law—Senator McClellan emphasized that while RICO

> draws heavily upon the remedies developed in the field of antitrust . . . [t]here is, however, no intention here of importing the great complexity of antitrust law enforcement into this field. Nor is there any intention of using the antitrust laws for a purpose beyond the legislative intent at the time of their passage.

115 Cong. Rec. 9567 (1969). It was, of course, precisely these reasons that led the Court in *Sedima* to "specifically caution[] courts against employing analogies to the Clayton Act that limit the scope or availability of RICO claims." *Chivas Products*, 864 F.2d at 1288 (Krupansky, J., dissenting).[14]

b. Petitioners' reliance on *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143 (1987), is misplaced. In *Malley-Duff*, the Court was faced with designing an appropriate limitations period for RICO where Congress had not provided one. That task involved the Court in a quasi-legislative activity that is by now a familiar (though perhaps not uncontroversial) part of this Court's jurisprudence. The Court concluded that the most appropriate

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[13] Congress seems to have rejected the idea of including RICO within the existing antitrust laws in order to avoid absorbing antitrust precedent in the framework of RICO. *See* 115 Cong. Rec. 6993-95 (1969).

[14] In *Sedima*, the RICO defendants sought to limit the scope of the statute by arguing that "just as an antitrust plaintiff must allege an 'antitrust injury,' so a RICO plaintiff must allege a 'racketeering injury.'" 473 U.S. at 485. The Court rejected this argument, noting that to borrow from antitrust principles would "create [] exactly the problems Congress sought to avoid." *Id.* at 498-99. In so holding, the Court found it significant that Congress had specifically sought to avoid burdening RICO plaintiffs with "a body of precedent appropriate in a purely antitrust context." *Id.*

analogy to RICO for limitations purposes was the Clayton Act's four-year statute of limitations. This kind of gap-filling involves "fashioning remedial details where Congress has not spoken *but left matters for judicial determination within the general framework of familiar legal principles.*" 483 U.S. at 146-47 (emphasis added), *quoting DelCostello v. Teamsters*, 462 U.S. 151, 158-59 (1983). In these narrow "quasi-procedural" areas, in which *some* rule is deemed necessary, the federal courts are authorized to exercise quasi-legislative power to fill in omitted details in the statutory scheme—and to draw rough analogies to other statutes as appropriate.[15]

In the present context, by contrast, only Congress can strip the state courts of jurisdiction. The federal courts possess no similar authority. If Congress has not divested the state courts of jurisdiction, "courts are constrained to enforce the presumption of concurrent jurisdiction." *Chivas Products*, 864 F.2d at 1288 (Krupansky, J., dissenting). Indeed, it would be wholly inappropriate for the Court to undertake such a task because it would necessarily intrude upon the prerogative of the various state legislatures to define the jurisdiction of their own courts. Thus, no matter what relevance the Clayton Act analogy has for other purposes, it is beside the point with respect to the jurisdiction of state courts.[16]

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[15] Sometimes this task requires application of the most analogous state law provision (*e.g.*, *Wilson v. Garcia*, 471 U.S. 261 (1985)); on other occasions, the Court may draw from a federal analogy (*e.g.*, *Malley-Duff*, 483 U.S. at 150).

[16] For similar reasons, petitioners' analogy to the "implied right of action" cases is inapposite. *See* Pet. Br. 26-28. In that situation, as in the limitations context, there may be a limited "quasi-legislative" role for the Court to play precisely because Congress has "tended to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question itself." *Cannon*, 441 U.S. at 718 (Rehnquist, J., concurring).

Even assuming the appropriateness of the analogy, however, it bears emphasis that the Court has never, to our knowledge, implied

c. Finally, the analogy to the Clayton Act ought to be rejected because when this Court, in 1922, held that jurisdiction over the antitrust laws is exclusively federal, the Court failed to take into account the presumptive jurisdiction of the state courts—and failed to apply, or even refer to, the standards set forth in *Claflin* for determining whether Congress has divested the state courts of jurisdiction. *See General Investment Co. v. Lake Shore Ry.*, 260 U.S. 261, 286-88 (1922). Thus, *General Investment* concluded that the federal courts have exclusive jurisdiction over federal antitrust claims (1) despite permissive language granting the right to bring an action in the federal courts; (2) in the absence of any discussion of evidence that Congress intended to divest the state courts of jurisdiction;[17] and (3) without evaluating whether there was any "disabling incompatibility" between the antitrust laws and state court jurisdiction.[18]

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a right of action *solely* on the basis of Congress' modeling one statute after another. *See Karahalios v. Nat'l Fed'n of Fed. Employees*, 109 S. Ct. 1282, 1287-88 (1989) (rejecting petitioner's modeling argument where there was no "evidence of [congressional] intent in the statute or its legislative history"). Rather, implication of a private right of action is warranted only where "that remedy is necessary or at least helpful to the accomplishment of the statutory purpose" (*Cannon*, 441 U.S. at 703), where such implication is supported by independent evidence of congressional intent (*id.* at 694), and where it would not frustrate state law interests to imply a private federal remedy (*id.* at 708). Those factors—which were all present in *Cannon*—are not present here.

[17] In fact, although the Court in *General Investment* did not refer to it, there is evidence in the legislative history of the Clayton Act to suggest that Congress intended to divest the state courts of jurisdiction. *See* Redish & Muensch, *Adjudication of Federal Causes of Action in State Court*, 75 Mich. L. Rev. 311, 318 (1976). Although one may question whether this evidence rises to the level of an "unmistakable implication," it may well have informed the Court's conclusion. There is, as demonstrated above, no comparable evidence in RICO's legislative history.

[18] Although the Court did not analyze the issue in *General Investment*, there may well have been reasons to deem state court

For these reasons, among others, at least two appellate panels have recently questioned the vitality of the rule of exclusive federal jurisdiction over federal antitrust claims. These cases have noted the difficulty of reconciling *General Investment* with *Claflin*, *Dowd*, and *Gulf Offshore*, and the anomaly of denying state courts the ability to hear antitrust claims, while allowing arbitration panels to do so. *See Village of Bolingbrook v. Citizens Util. Co. of Ill.*, 864 F.2d 481, 484-85 (7th Cir. 1988) (Easterbrook, J.); *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1152-53 (7th Cir. 1984) (en banc) (Posner, J.), *rev'd on other grounds*, 470 U.S. 373 (1985). Although principles of *stare decisis* may well counsel against revisiting the issue in the antitrust context, there is no reason to perpetuate the anomaly presented by the federal courts' exclusive jurisdiction over federal antitrust claims in order to carry it over to the RICO context.

C. There Is No Clear Incompatibility Between RICO And State Court Jurisdiction.

This case falls far short of presenting the type of "disabling incompatibility" (*Gulf Offshore*, 453 U.S. at 477) between state court jurisdiction and federal interests that might warrant depriving the state courts of their pre-

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jurisdiction less compatible with the federal antitrust laws. "Antitrust violations generally have a widespread impact on national markets as a whole, and the antitrust treble-damages provision gives private parties an incentive to bring civil suits that serve to advance the national interest in a competitive economy." *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2345 (1987). The antitrust laws might, therefore, be viewed as peculiarly national in character. Accordingly, the need to develop a federal antitrust jurisprudence, predicated on considerations of national economic policy, and giving substance to the remarkably open-ended legislative mandate of those laws, provides at least some support for federal exclusivity. These concerns are simply not present with respect to RICO. *See McMahon*, 107 S. Ct. at 2345.

sumptive jurisdiction. In arguing broadly that something about civil RICO is incompatible with state court jurisdiction, petitioners raise issues about the desirability of uniformity of decision and about the competence of the state courts to adjudicate federal claims. Yet these perceived problems—to the extent that they are problems, and not virtues, of our federal system—are implicated by state court adjudication of virtually any federal claim. They arise from the fact that the state courts presumptively possess concurrent jurisdiction over federal claims. These general concerns cannot mask the fact that, at bottom, the states share the federal government's interest in eradicating organized crime and in compensating its victims, that their courts are competent to adjudicate issues arising under the statute, and that RICO's remedial purposes are furthered by allowing citizens injured by organized criminal activity to bring RICO claims in their own courts as well as in the federal courts. Petitioners simply cannot bring RICO within the narrow class of cases in which constitutional concerns warrant a finding of incompatibility between a federal claim and state court adjudication of that claim.

1. As a general matter, far from being "incompatible" with state court jurisdiction, "[p]ermitting state courts to entertain federal causes of action *facilitates* the enforcement of federal rights." *Gulf Offshore*, 453 U.S. at 478 n.4 (emphasis added).[19] This is particularly so where the dominant purpose of the statute is remedial and where the legislative record indicates that Congress' intent was to *supplement*, rather than displace, existing

[19] Indeed, Congress has so arranged the limited jurisdiction of federal courts that some federal laws *can be enforced only* in the state courts. See, *e.g.*, 28 U.S.C. § 1331, conferring jurisdiction upon federal courts of civil actions arising under the Constitution, laws, or treaties of the United States only if the matter in controversy exceeds the sum or value of $10,000. *Dowd Box*, 368 U.S. at 508 n.4 (emphasis added).

remedial schemes. *See Dowd Box*, 368 U.S. at 511-12. As noted above, Congress' purposes in enacting RICO were broadly remedial—"to see that innocent parties who are the victims of organized crime have a right to obtain proper redress" [20]—and Congress intended to *supplement* the remedies that had long been available in both state and federal courts. *See, e.g.*, S. Rep. No. 617, 91st Cong., 1st Sess. 160-61 (1969). It is difficult to see how allowing RICO actions to be heard in the state courts is in any sense inconsistent with these basic objectives or, conversely, how limiting RICO's jurisdiction to the federal courts would further these goals.

In *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2345 (1987), this Court concluded that RICO's remedial objectives were promoted rather than impaired by allowing arbitral tribunals to entertain RICO actions. Indeed, the Court's inquiry in that context—whether "there is an irreconcilable conflict between arbitration and enforcement of the RICO statute" (*id.* at 2345)—is strikingly similar to the question posed here. If anything, the burden on petitioners in this case to prove a "disabling incompatibility" should be far higher given our fundamental regard for the authority of state courts within our federal system. Nevertheless, the Court in *McMahon* unanimously held that "there is no inherent conflict between arbitration and the purposes underlying § 1964(c)." *Id.* at 2345-46. *McMahon* compels the similar conclusion that there is no inherent conflict between state court jurisdiction and the purposes underlying § 1964(c).[21]

[20] 116 Cong. Rec. 35346-47 (1970) (Rep. Steiger), *quoted in McMahon*, 107 S. Ct. at 2345.

[21] To be sure, the Court has also held some claims within the exclusive jurisdiction of the federal courts to be amenable to arbitration. *See McMahon*, 107 S. Ct. at 2338-43 (Exchange Act claims held arbitrable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (federal antitrust claims

2. This Court has appeared to refer to "disabling incompatibility" in two distinct, but related, senses. On the one hand, in *Claflin*, the Court alluded to a limited class of cases in which some structural feature of the federal plan itself would counsel against state court jurisdiction. *See* 93 U.S. at 136-37. In practice, this type of "incompatibility" has been limited to cases where the federal claim at issue is a claim against the federal government, its officers, instrumentalities or creations. In these circumstances, considerations of federal sovereign immunity are incompatible with state court jurisdiction.

On the other hand, in *Gulf Offshore*, this Court appeared to refer to incompatibility in a second sense, not with reference to some inherent characteristic of the federal system, but in relation to the specific statute that Congress enacted. *See* 453 U.S. at 481-84. "Incompatibility" in this sense is no more than a restatement of the basic Supremacy Clause principle that state law that conflicts with, or frustrates, federal law, cannot stand. Thus, where the state court's exercise of adjudicative authority, in and of itself, conflicts with the purposes of the federal statutory scheme, such jurisdiction is barred.

a. One may conceive of cases in which state court jurisdiction would run afoul of the basic structure of federalism. Several early decisions of this Court held that state judges could not, consistent with the Supremacy Clause, order the discharge of someone in the custody of the federal government upon a writ of habeas corpus. *See, e.g., Ableman v. Booth*, 62 U.S. (21 How.) 506

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arising out of international commercial transactions held arbitrable). That is beside the point. Not every claim over which *Congress* chooses expressly to confer exclusive jurisdiction on the federal courts is one in which there would otherwise be a "disabling incompatibility" between the federal claim and state court jurisdiction. The "disabling incompatibility" rule is a constitutional standard. Other reasons may motivate Congress to exercise its discretion to vest jurisdiction over a claim exclusively in the federal courts.

(1858); *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871). These cases reasoned, in part, that such action would constitute a wrongful "interference" by the states with the paramount sovereignty of the federal government. Similarly, when Congress creates a statutory cause of action against the federal government, allowing suit against the federal government in a federal forum (*e.g.*, 28 U.S.C. § 1491), this would not ordinarily be construed as a cause of action that could also be pursued in the state courts—at least absent a clear statement by Congress that it so intended. The federal government's paramount sovereignty, and our historic understanding of sovereign immunity, compels that result.

Likewise, one would not expect that federal agencies would be subject to review actions, under the Administrative Procedure Act, in state court, irrespective of any explicit provision for federal exclusivity. Such suits would inevitably raise sovereign immunity concerns to the extent they required Executive Departments and agencies to account for their actions in the courts of another, and inferior, sovereign. These same concerns for overriding federal sovereignty have prompted this Court's statements that it would not expect national banks to be subject to jurisdiction in state court absent an express grant of such jurisdiction by the Congress. *See, e.g., Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 559-60 (1963); *First Nat'l Bank v. Union Trust Co.*, 244 U.S. 416, 428 (1917).

It may be that there are other situations in which an overriding federal interest, implicit in the constitutional framework itself, would divest state courts of power to adjudicate federal claims. *Cf. Gulf Offshore*, 453 U.S. at 481-82 (exclusive federal province over offshore waters does not limit state court jurisdiction). But if such circumstances exist, they are not yet apparent and certainly are not present here.

b. Similarly limited are the circumstances in which some federal statute might be found to have preempted state *adjudicative* jurisdiction. Preemption of state court adjudicative jurisdiction cannot arise from the nature of the substantive right that Congress has created: Because state courts are obliged to apply precisely the same legal standards as the federal courts, there can be no "conflict" between a federal substantive right and state court adjudication of that right.[22] State court judges are presumptively as competent to handle federal questions as are federal court judges.

An "incompatibility" of the kind that would preempt the jurisdiction of state *courts* can only arise from the peculiar nature of the federal statute's remedial scheme. Thus, where Congress has concentrated litigation for the adjudication of certain rights in a specially constituted tribunal, it might be fair to conclude that parallel state court jurisdiction would be inconsistent with Congress' purpose in establishing such a tribunal—whether that purpose be uniformity of decision or the development of special adjudicative expertise. For example, in *Garner v. Teamsters*, 346 U.S. 485, 490 (1953), this Court held, in language that petitioners quote (Pet. Br. 30-31), that a state court (or a federal court for that matter) could not adjudicate a controversy that fell within the jurisdiction of the National Labor Relations Board, "a specific and specially constituted tribunal" for which "a particular procedure" was prescribed "for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order." *Garner* exemplifies those cases where Congress makes it clear that it intends for all decisions to emanate from a specific tribunal.

[22] Federal preemption of state legislative power—*i.e.*, the state's "political jurisdiction" (*Gulf Offshore*, 453 U.S. at 480)—will not by itself operate to divest state court jurisdiction. *Id.* at 480-82.

Petitioners' effort to draw an analogy between the National Labor Relations Act as expounded in *Garner* and RICO is misguided. There *might* be an analogy if, for example, Congress had assigned adjudication of claims under RICO, not to *any* federal court, but to a single district court and required that court to accord such claims a special priority: In that circumstance, it might be reasonable to infer that Congress intended to focus adjudication in a single court in order to develop uniformity, foster expertise, and expedite consideration of such claims. In such situations, the goal of federal uniformity or expertise is not merely an unexpressed policy preference to be read *into* the statute by the Court, but an affirmative congressional mandate, embodied in a statutory procedure, and with which a state court's assertion of jurisdiction would arguably be incompatible.

c. None of the foregoing considerations are present with respect to RICO. RICO is not a statute that implicates any concerns about federal sovereign immunity. Nor is RICO a statute under which Congress specially constituted or ordained some judicial or administrative tribunal to ensure the development of a uniform or expert jurisprudence.[23] On the contrary, RICO is as amenable to state court adjudication as it is to resolution in the

[23] As the court noted in *United States v. Turkette*, 452 U.S. 576, 586 n.9 (1981), in enacting RICO, Congress specifically directed that "[n]othing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title." 84 Stat. 947. Laws by which Congress seeks to expand upon available state remedies rather than preempting them are particularly appropriate for resolution in a state forum—especially when the subject area is one which has previously been under the exclusive control of the states. When Congress specifically disclaims any intention to wrest control of the problem from the states, and instead implies that federal and state law should work together to deal with the problem, it would be anomalous to conclude that Congress intended to deprive the states of the ability to enforce the federal remedy.

federal courts. That all of the state high courts to have reached this issue have found themselves competent to entertain such claims confirms this point. *See Simpson Elec. Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450, 530 N.E.2d 860 (1988); *Rice v. Janovich*, 109 Wash.2d 48, 742 P.2d 1230 (1987); *Cianci v. Superior Court*, 40 Cal.3d 903, 710 P.2d 375 (1985).

3. One law review article, cited by petitioners (Pet. Br. 13), has urged the Court to use the "incompatibility" test to engage in "creative judicial lawmaking" that would look to "the practical needs of the federal system as perceived by the court." Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 Mich. L. Rev. 311, 329 (1976). Under this suggested approach, "when Congress is silent on the question of concurrent jurisdiction, a court may examine the potential impingement on important federal interests and programs that might result from their consideration by state judges who lack sufficient background, expertise or—on occasion—competence to deal with these uniquely federal concerns." *Id.*

Such an approach to "incompatibility," we submit, is at odds with *Claflin* and its origins. It trivializes the principle that state courts possess inherent authority over federal claims and effectively grants the federal courts a lawmaking power as respects the jurisdiction of the state courts. Whether state courts *should* be ousted from their jurisdiction is not a determination that the federal courts should have authority to decide. Because ouster of state court jurisdiction is something that can be achieved only through the enactment of a statute, there is neither room nor a need for "creative judicial lawmaking." In short, the premises of such an analysis are inconsistent with this Court's traditional approach to the problem.

In *Gulf Offshore*, this Court referred to the kind of factors that might be relevant to such a "creative judicial lawmaking" analysis. *See* 453 U.S. at 483-84 & n.13

(citing Redish & Muench). In so doing, however, the Court did not endorse an expansive notion of "incompatibility." Instead, the Court simply sought to demonstrate that the petitioners in *Gulf Offshore* had failed to present a persuasive case even under that generous standard. The same is true of petitioners' argument here.

Petitioners make three arguments in support of their incompatibility thesis: (a) that there is a need to interpret RICO uniformly and consistently, and that state court jurisdiction would undermine this objective (Pet. Br. 33-35); (b) that "[a]llowing state courts to adjudicate civil RICO claims, including the necessarily attendant interpretation and construction of federal criminal statutes as applied to the facts of each case," would be "inconsistent with the express intent of Congress that the federal courts alone should adjudicate federal criminal law" (Pet. Br. 11, 29-33); and (c) that RICO's procedural mechanisms "are inconsistent with any assertion that the fifty state courts should have concurrent jurisdiction" (Pet. Br. 11, 36-37). Each of these arguments is without merit.

a. Petitioners' contention that state court jurisdiction is at odds with an asserted need for uniformity overlooks several important points. *First*, Congress is well equipped to ensure uniformity and consistency when it thinks these attributes important to the construction of federal law: For example, it can limit jurisdiction to only certain specified courts (*e.g.*, 42 U.S.C. § 1973(c) (Voting Rights Act)); it can create specialized tribunals to have primary responsibility for the development of federal law in certain areas (*e.g.*, 28 U.S.C. §§ 1491 (Claims Court), 1295 (U.S. Court of Appeals for the Federal Circuit)); or it can expressly confer exclusive jurisdiction on the federal courts (*e.g.*, 28 U.S.C. §§ 1333 (admiralty), 1338 (patent and copyright)). Congress elected none of these options in enacting RICO. There is simply no evidence that Congress regarded uniformity to be any more essential to RICO than to any other federal statute.

Indeed, the claimed need for uniformity is particularly weak with respect to RICO. Because all of the conduct to which RICO attaches criminal penalties and civil liability is already criminal conduct, it could not seriously be argued that lack of uniformity will

> confuse efforts to conform conduct to law nor threaten disappointment of legitimate expectations as might result from varying interpretations of the antitrust laws. As to the antitrust laws, which involve the prohibition against certain modes of conducting otherwise lawful businesses, there might be considerable confusion and harm to the legitimate business world if the prohibitory scheme were interpreted in different ways by different court systems. Such danger justifies the exclusive federal jurisdiction. RICO is fundamentally different. RICO does not criminalize otherwise lawful conduct. It merely attaches new consequences to traditionally criminal conduct.

Ritchie v. Carvel Corp., No. 87 Civ. 8856 (S.D.N.Y. June 20, 1989) (available on WESTLAW). Thus, whatever the need for uniform interpretation under the antitrust laws, where businessmen need to be able to understand the law in order to make legitimate business decisions, there is little or no such need under RICO.

Second, uniformity is not, in any case, the overriding goal of our system of concurrent state and federal jurisdiction. That "diversities and conflicts" may occur in the construction of federal law is "no more than the usual consequence of concurrent state and federal jurisdiction over cases arising under federal law. To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court." *Dowd Box*, 368 U.S. at 514.[24] State courts are no less able to follow the law

[24] Even with respect to this Court's appellate jurisdiction over state court judgments, uniformity concerns have not historically been of paramount importance. As Professor Gunther has explained:

> The Judiciary Act of 1789 did *not* grant to the Court all of the potential article III appellate jurisdiction, even in constitutional cases, necessary to assure that the Supreme Court would be the ultimate provider of both supremacy and uniformity. Rather, section 25 of the Act, dealing with review of state court decisions, was essentially a supremacy-assuring device; it was *not* primarily concerned with uniformity. Supreme Court review was available only when a state court denied a federal claim; when the state court sustained a federal claim, even when its reading of federal law differed from that of federal tribunals, review was unavailable. Such was the scheme of the jurisdictional statutes for more than a century, until 1914.

Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 906-07 (1984).

as laid down by this Court than are the many judges of the federal court system in the twelve judicial circuits.

More important, some "diversities and conflicts," at least in the first instance, are "not necessarily [an] unhealthy prospect." *Dowd Box*, 368 U.S. at 514. One of the virtues of allowing state court judges to pass upon federal law claims is that, on occasion, they may be able to bring unique knowledge, perspective and experience to difficult legal questions. This may be especially so in an area, like RICO, that historically has been within the province of state law. For example, the state courts, drawing upon established state law precedent, may well have something important to contribute to the development of a meaningful definition of a "pattern of racketeering activity" that has so far eluded the federal courts. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893 (1989). And if they ultimately do not, they are no less competent than federal judges to follow any guidance provided by this Court.

b. Petitioners' second argument, attributing jurisdictional significance to the fact that RICO's civil provisions

relate directly to its criminal components, was rejected by this Court in *McMahon*. 107 S. Ct. at 2344. The McMahons urged that "the 'overlap' between RICO's civil and criminal provisions renders § 1964(c) claims non-arbitrable." *Id.* The Court disagreed. Reiterating its repudiation of the view that § 1964(c) "provide[s] civil remedies for offenses criminal in nature," (107 S. Ct. at 2344, *quoting Sedima*, 473 U.S. at 492), the Court found no inconsistency between RICO and adjudication by arbitration.[25]

It would be incongruous to suppose that Congress would permit an arbitration panel to hear RICO claims, despite the criminal dimensions of the statute, but would for this reason deny jurisdiction to the state courts. The state courts are, after all, considerably more experienced in interpreting criminal law, including federal criminal law,[26] than are most arbitration panels. Moreover, to the extent it is at all unusual for the courts of one sovereign to interpret the criminal laws of another, it is just as

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[25] There is, of course, no inherent inconsistency between state court jurisdiction over federal civil actions that have federal criminal counterparts. For example, 42 U.S.C. §§ 1983 and 1988, which provide a cause of action for the deprivation of federal rights, have a criminal counterpart. *See* 18 U.S.C. § 242. But that has not been viewed as any bar to state court jurisdiction over § 1983 claims.

[26] There is nothing in our system of dual sovereignty to preclude state court resolution of federal criminal law issues. Although Congress has, as a general rule, expressly given the federal courts exclusive jurisdiction over federal criminal law (*see* 18 U.S.C. § 3231), there have been occasions where the state courts have enjoyed concurrent jurisdiction over federal criminal statutes. *See generally* Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545 (1925).

Indeed, the fact that the first Congress felt compelled to pass a statute expressly vesting exclusive jurisdiction in the federal courts over federal criminal offenses only confirms the fact that, in the absence of such a statute, the state courts would have jurisdiction over federal criminal offenses.

unusual for the federal courts to be construing RICO's *state* criminal law predicate acts as it is for the state courts to be applying federal criminal law. No one would seriously suggest that federal court unfamiliarity with state crimes has hampered federal court RICO enforcement. Finally, it is simply not true that state judges are unfamiliar with the construction of RICO's federal predicate acts since many state "little RICO" laws incorporate these same federal predicate acts in their definitions of "racketeering activity." [27]

Petitioners also dramatically overstate the "complexity" of interpreting RICO's predicate offenses. This aspect of RICO's jurisprudence has engendered little controversy in either the federal or state courts. *See Simpson Elec. Corp.*, 530 N.E.2d at 865.[28] This is hardly surprising. In general, even those RICO predicate offenses that are federal are only nominally so. *See Chivas Products*, 864 F.2d at 1289 (Krupansky, J., dissenting). As one commentator noted, "RICO lets civil plaintiffs sue in federal court for treble damages based on conduct that historically had been within the exclusive jurisdiction of state courts under common law principles of tort or contract law." *Id.*, *quoting* Cole & McNamara, 12 *Litigation* 24, 25 (Spring 1986). "If anything, RICO involves federal courts in the adjudication of state law claims rather than the other way around." *Lou*, 834 F.2d at 738. *See also United States v. Turkette*, 452 U.S. 576, 586-87 (1981) (criminal RICO moves "large substantive areas formerly totally within the police power of the State into the Federal realm.")

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[27] *See, e.g.*, N.J. Stat. Ann. § 2C:41-1a(2) (defining predicate acts to include "any conduct defined as 'racketeering activity' under Title 18, United States Code, s. 1961(1)(A), (B) and (D)"); Ohio Rev. Code Ann. § 2923.31(I)(1) (same).

[28] The adjudication of a RICO claim "seldom require[s] sophisticated analysis of the underlying federal statutes, for most disputes concerning predicate acts are purely factual." *Brandenburg*, 859 F.2d at 1195.

c. Finally, petitioners argue that state court jurisdiction is incompatible with RICO because the statute provides for enforcement of RICO in federal court by federal officials (Pet. Br. 36). Petitioners also argue that because the venue and process provisions of the statute only apply in federal court, they constitute evidence that Congress intended that RICO actions could be maintained only there. (*Id.*) Neither of these arguments supports the conclusion that state court adjudication is incompatible with RICO.

First, the fact that Congress has provided for the enforcement of a federal statute by federal officials is not surprising. It is entirely customary for the federal government to prosecute actions in the federal rather than state courts. This says nothing about where a private citizen may bring a private enforcement action. *Brandenburg*, 859 F.2d at 1194; *Lou*, 834 F.2d at 738 n.7. It is, in any case, difficult to see how concurrent jurisdiction over a private claim would be "incompatible" with government enforcement of the statute in federal courts.

Second, the fact that Congress elected to prescribe certain procedural rules for the enforcement of RICO actions in federal court is neither unusual nor relevant here since the states generally retain the authority to promulgate procedural rules for their courts even where the right being asserted derives from federal law.[29] Thus, in *Dowd Box*, this Court had no difficulty holding that there is concurrent jurisdiction over Labor Management Relations Act § 301(a) suits despite the presence of federal enforcement and venue provisions similar to those in RICO. *See* 368 U.S. at 503 n.1. *See generally Simpson Elec. Corp.*, 530 N.E.2d at 865; *Chivas Products*, 864 F.2d at 1291 (Krupansky, J., dissenting). Similarly, the

[29] "The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954).

cause of action provided by 42 U.S.C. § 1983, and the right to attorneys' fees provided by § 1988, are available in state court (*see Maine v. Thiboutot*, 448 U.S. 1 (1980)) despite the fact that § 1988 itself provides very specific procedures for the conduct of federal court proceedings.

4. Concurrent jurisdiction ordinarily prejudices neither plaintiffs nor defendants. The existence of concurrent jurisdiction will not, of course, affect the right of either party to have his case heard on the merits. Moreover, in the ordinary case, neither party will even be deprived of the right to choose the *federal* forum if he so wishes. As this Court pointed out in *Gulf Offshore*, "[e]xclusive federal-court jurisdiction over a cause of action [] is unnecessary to protect the parties. The plaintiff may choose the available forum he prefers, and the defendant may remove the case if it could have been brought originally in a federal court. 28 U.S.C. § 1441(b)." 453 U.S. at 483 n.12.

In this case, however, the decision whether to allow the state courts jurisdiction does matter both to the parties and to our federal system. That is because the courts below concluded that Maryland's comprehensive approach to its savings and loan crisis, implemented through the state courts, required the federal courts to abstain from the exercise of their jurisdiction in order to avoid interference with the state plan. *See Brandenburg*, 859 F.2d at 1191-92. The courts below found this case to be one in which the state courts are far *better* equipped than the federal courts to hear the entirety of some controversy—in a context where resolution in a single forum (rather than piecemeal in two courts) represented the most practical way to proceed. No one has, or could, challenge the lower courts' conclusion that this is a compelling case for abstention.

As this case illustrates, therefore, the *only* situation in which a determination that jurisdiction is not concurrent

will have any material significance on the conduct of a litigation is where the unique circumstances of the case, and concerns for our federal system, combine to compel the conclusion that the state courts, and not the federal courts, *should* have jurisdiction of the case. Nothing about RICO, and nothing in the precedents of this Court, provides a basis upon which this Court might reach that odd result in this case.

CONCLUSION

The judgment of the Fourth Circuit should be affirmed.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
RALPH S. TYLER, III
Assistant Attorney General
OFFICE OF THE
ATTORNEY GENERAL FOR
THE STATE OF MARYLAND
Munsey Building, 2nd Floor
Seven North Calvert Street
Baltimore, Maryland 21202
(301) 576-6342
Counsel for
State of Maryland Deposit
Insurance Fund Corporation

DAVID B. ISBELL
WILLIAM H. ALLEN
CHARLES F.C. RUFF
MARK H. LYNCH
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202) 662-6000
Counsel for
Venable, Baetjer & Howard

ANDREW H. MARKS
Counsel of Record
CLIFTON S. ELGARTEN
LUTHER ZEIGLER
ELAINE A. PANAGAKOS
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500
Counsel for
Former Directors and Officers
of Maryland Savings-Share
Insurance Corporation

Additional Counsel for Respondents

JAMES P. ULWICK
KRAMON & GRAHAM
Sun Life Building
Charles Center
20 South Charles Street
Baltimore, Maryland 21201
(301) 752-6030

JAMES A. ROTHSCHILD
ANDERSON, COE & KING
Central Savings Bank Building
Suite 2000
201 North Charles Street
Baltimore, Maryland 21201
(301) 752-1630

PAUL D. KRAUSE
CAROL ANN PETREN
JAYSON L. SPIEGEL
JORDON COYNE SAVITS & LOPATA
Suite 500
1030 15th Street, N.W.
Washington, D.C. 20005
(202) 371-1800

DANIEL F. GOLDSTEIN
BROWN & GOLDSTEIN
Maryland Bar Center
Suite 300
520 W. Fayette Street
Baltimore, Maryland 21201
(301) 962-1030

AUBREY M. DANIEL, III
WILLIAMS & CONNOLLY
Hill Building
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

ANDREW RADDING
BLADES & ROSENFELD, P.A.
1200 Sun Life Building
20 South Charles Street
Baltimore, Maryland 21201
(301) 539-7558

ROBERT W. HESSELBACHER, JR.
LAXALT WASHINGTON PERITO
& DUBUC
10th Floor
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-4000

FRANCIS S. BROCATO
BROCATO, PRICE & BUSHEL, P.A.
The Fidelity Building
210 North Charles Street
Baltimore, Maryland 21201
(301) 576-7300

JOHN E. SANDBOWER, III
SANDBOWER GABLER
& O'SHAUGHNESSY
5th Floor
23 East Fayette Street
Baltimore, Maryland 21202
(301) 576-0762

STEPHEN C. WINTER
WINTER & ASSOCIATES
606 Bosley Avenue
Towson, Maryland 21204
(301) 321-6222

NANCY A. MARKOWITZ
ANDERSON KILL OLICK
& OSHINSKY
Suite 700
1800 K Street, N.W.
Washington, D.C. 20006
(202) 728-3100

RONALD W. FUCHS
ECCLESTON & SEIDLER
Suite 100
110 East Lexington Street
Baltimore, Maryland 21202
(301) 752-7474

HOWARD B. POSSICK
ARENT FOX KINTNER PLOTKIN
& KAHN
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-6176

JAY I. MORSTEIN
FRANK BERNSTEIN CONAWAY
& GOLDMAN
300 East Lombard Street
Baltimore, Maryland 21202
(301) 625-3500

HAROLD H. BURNS
MAUREEN F. MACKEY
Suite 200
300 Cathedral Street
Baltimore, Maryland 21201
(301) 528-0044

THOMAS G. BODIE
POWER & MOSNER
21 W. Susquehanna Avenue
Towson, Maryland 21204
(301) 823-1250

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FRANCINE TAFFLIN, et al.

Petitioners,

— v. —

JEFFREY A. LEVITT, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

M. Norman Goldberger
Brian P. Flaherty
*Gary L. Leshko
WOLF, BLOCK, SCHORR AND SOLIS-COHEN
Twelfth Floor,
Packard Building
15th and Chestnut Streets
Philadelphia, PA 19102-2678
(215) 977-2000
Counsel for Petitioners
**Counsel of Record*

Of Counsel:
Lawrence I. Weisman
306A Hampton Plaza
300 E. Joppa Road
Towson, Maryland 20204
(301) 583-9030

PACKARD PRESS / LEGAL DIVISION, 1617 J.F.K. BOULEVARD, PHILA., PA. 19103 (215) 563-9000

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No. 88-1650

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FRANCINE TAFFLIN, et al.,
Petitioners,

— v. —

JEFFREY A. LEVITT, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

ARGUMENT

I. Introduction

Respondents concede that the issue before the Court — whether jurisdiction over civil claims brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, resides exclusively in the federal courts — is controlled by the analytical framework established by this Court in *Claflin v. Houseman*, 93 U.S. 130 (1876) and most recently reaffirmed in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981). While Respondents quote the language of the *Gulf Offshore* test, however, they do not apply that

test but instead alter both its terms and its application in order to sustain their position that RICO is within the concurrent jurisdiction of the state courts. That attempt to alter over one hundred years of the Court's jurisprudence should be rejected.[1]

II. A Proper Analysis Of RICO's Legislative History Demonstrates The Requisite Congressional Intent That RICO Jurisdiction Should Be Exclusively Federal.

In *Gulf Offshore,* the Court described the operative analytical methodology for determining whether the federal courts have exclusive jurisdiction over a civil action created by Congress as follows:

> In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts *either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.*

453 U.S. at 478 (emphasis added) (citations omitted).

The legislative history of RICO creates an unmistakable implication that jurisdiction over civil actions brought under it is exclusively federal. As demonstrated in Petitioners' Brief ("Pet. Br."), the legislative history of RICO and the decisions of this Court establish that

1. Since the filing of Petitioners' Brief, the Court of Appeals for the Third Circuit, in *McCarter v. Mitcham,* No. 88-3654 (3d Cir. August 16, 1989) held, with minimal discussion, that jurisdiction over RICO is concurrent. Judge Sloviter concurred in the result but filed a lengthy dissenting opinion on the RICO jurisdiction issue. *See McCarter,* slip op. at 21-28.

when Congress enacted the civil provisions of the statute, it expressly modeled those provisions upon the Clayton Act. *See Agency Holding Corp. v. Malley-Duff & Associates,* 483 U.S. 143 (1987); *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479 (1985). Civil actions brought under section 4 of the Clayton Act, 15 U.S.C. § 15(a), have long been held to be within the exclusive jurisdiction of the federal courts, and Congress, when enacting RICO, must be presumed to have known of those decisions and to have intended that section 1964(c) of RICO would be interpreted in the same fashion as section 4 of the Clayton Act with respect to the issue of exclusive jurisdiction. (*See* Pet. Br. at 25-28.)

Respondents, in their Brief ("Resp. Br."), attempt to avoid the force of the extensive and indisputable legislative history of RICO[2] by proffering what can only be described as a novel standard, not rooted in *Claflin* and *Gulf Offshore,* and unsupported by any case law, for determining whether jurisdiction over civil RICO claims is exclusively federal. In Respondents' view, only an express provision in the statutory language providing for exclusive jurisdiction would be sufficient to confer exclusive jurisdiction on the federal courts. They argue that exclusive jurisdiction requires "an *affirmative act* of Congress," – that is, an "explicit statutory directive." (Resp. Br. at 7, 17) (emphasis added). *(See also* Resp. Br. at 15, 19, 21 n.12, 23.)

2. Respondents also argue that the Court should not consider Congress' reliance upon the Clayton Act in deciding the RICO jurisdiction issue because, according to Respondents, this Court's longstanding holding that jurisdiction over the antitrust laws is exclusively federal is suspect. (*See* Resp. Br. at 24-25.) Even if Respondents were correct in their view, however, the issue whether the antitrust laws *should* be subject to exclusive federal jurisdiction is irrelevant to the issue before this Court. The relevant point here is that, at the time RICO was enacted, the Clayton Act had long been held to provide for exclusive federal jurisdiction, and Congress must be presumed to have been aware of those decisions when it modeled RICO upon the Clayton Act.

This suggested "test" is unsupported by the holdings and language of *Gulf Offshore, Claflin,* and *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962). Each of those cases squarely held that Congress could by *implication* create exclusive federal jurisdiction, and in *Gulf Offshore* and *Charles Dowd* the Court analyzed the legislative history for the purpose of determining whether Congress had by implication conferred exclusive jurisdiction in the federal courts over the federal statutes at issue in those cases. Accordingly, Respondents' proposed standard for determining exclusive jurisdiction should be rejected.

While proffering this new and unprecedented test for determining exclusive jurisdiction, Respondents reluctantly acknowledge in passing that this Court's decisions require a finding of exclusive federal jurisdiction if the legislative history of a federal statute supports an implication of exclusive federal jurisdiction.[3] They contend, however, that RICO's legislative history is "silent". (Resp. Br. at 19.) This contention ignores the extensive Congressional record surrounding RICO's enactment, which is replete with considered references to the Clayton Act evidencing the conscious and explicit intent of Congress to model RICO's remedial mechanisms upon the antitrust laws. It is that very modeling which demonstrates a clear implication of exclusive federal jurisdiction.[4]

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3. Respondents, however, contend that this Court has merely "allowed" that exclusive jurisdiction may be shown by an unmistakable implication arising from the legislative history, and imply that this "allowance", which is at odds with Respondents' view of what the test for exclusivity *should* be, is somehow improper. (Resp. Br. at 17.) On the contrary, however, as set forth in Petitioners' Brief at 12-19, this Court's decisions relating to the issue of exclusive jurisdiction reflect a considered application of constitutional principles and two hundred years of precedent dating back to the writings of Alexander Hamilton. *See* The Federalist No. 82.

4. Respondents' contention that the legislative history of RICO is "silent" is based solely, it would appear, on Professor G. Robert Blakey's comment that, to his knowledge, "no one [in Congress] even thought of the issue" of concurrent jurisdiction. (Resp. Br. at 18 (citing Flaherty, *Two States Lay Claim to RICO,* Nat. L.J., May 7, 1984, at 3, col. 2).) Respondents, however, give credence to Professor Blakey only when his comments appear to support their position, since they deprecate his comments in support of exclusive jurisdiction. (Resp. Br. at 18 n.11.) In any event, Professor Blakey's views, while academically interesting, are not relevant to the point now before the Court. What is pertinent is that, as demonstrated in Petitioners' Brief, *Congress* modeled RICO on the Clayton Act and that Act has been held to be within the exclusive jurisdiction of the federal courts.

Finally, Respondents contend that this Court's explication of the analogy between RICO and the Clayton Act is irrelevant to this case because *Malley-Duff* involved the proper exercise of this Court's authority to interpret statutes, while the instant case, according to Respondents, does not, since it involves something other than statutory interpretation. (Resp. Br. at 22-23.) This assertion is simply wrong. Consistent with the *Gulf Offshore* test, the instant case only requires, as did *Malley-Duff* and *Sedima*, the judicial construction and interpretation of RICO based upon Congressional intent and legislative history "within the general framework of familiar legal principles." *Malley-Duff,* 483 U.S. at 147 (quoting *DelCostello v. Teamsters,* 462 U.S. 151, 158-59 (1983)).[5]

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5. Respondents' related assertion that a finding of exclusive jurisdiction under RICO would "intrude upon the prerogative of the various state legislatures to define the jurisdiction of their own courts" (Resp. Br. at 23) rests on two false premises: first, that the judicial construction of RICO constitutes anything other than the traditional exercise of the Court's authority to construe and interpret statutes; and, second, that the state legislatures have any "prerogative" to confer jurisdiction over federal statutes upon their courts when the statutes meet one of the *Gulf Offshore* tests.

III. Petitioners Have Demonstrated That RICO Is Incompatible With Concurrent State-Court Jurisdiction Under The *Gulf Offshore* Test.

A. *The Appropriate Test For Incompatibility*

In *Gulf Offshore,* this Court held that federal courts have exclusive jurisdiction over federal claims when there is a "clear incompatibility between state-court jurisdiction and federal interests." *Gulf Offshore,* 453 U.S. at 478. Accordingly, the Court explicitly considered whether the "operation" of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.,* would be "frustrated" by concurrent state-court jurisdiction over state-law tort and contract actions brought under the statute, 453 U.S. at 483, and enumerated some of the factors to be evaluated in making such a determination, stating:

> The factors generally recommending exclusive federal-court jurisdiction over an area of federal law include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims.

453 U.S. at 483-84 (footnote omitted).

Thus, the issue now before the Court, as clearly defined in *Gulf Offshore,* is whether the structure and purposes of RICO are incompatible with, or would be frustrated by, state-court jurisdiction over civil RICO claims.[6] As Petitioners have previously explained (Pet. Br. at 28-37), application of this facet of the *Gulf Offshore* test also requires a finding of exclusive federal-court jurisdiction.

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6. Similarly, in *Claflin,* the Court noted that jurisdiction is exclusively federal when there is an "incompatibility in [the] exercise [of state-court jurisdiction] arising from the nature of the particular case," 93 U.S. at 136, language quoted by the Court in *Charles Dowd,* 368 U.S. at 508.

Respondents' view of the incompatibility test is strained and exceedingly narrow. They assert that incompatibility can only exist where the claim at issue is asserted against the federal government or its officers or instrumentalities,[7] or when Congress "specially constitute[s] or ordain[s] some judicial or administrative tribunal to ensure the development of a uniform or expert jurisprudence." (Resp. Br. at 28-31.)

Respondents' argument not only is devoid of support in the law, but is refuted by the express language of *Gulf Offshore* and over a century of case precedent, none of which even suggests such a strained and selective definition of "incompatibility." Rather, this Court's cases provide in more general and logical terms that the type of incompatibility required to render federal jurisdiction exclusive is that which would frustrate the effective operation of the federal statutory scheme. As noted above, although the two factors listed by Respondents plainly would tend to show incompatibility, the Court in *Gulf Offshore* considered several other factors which could lead to a finding of incompatibility. Moreover, there is no suggestion in *Gulf Offshore* that even the list of factors set forth there is all-inclusive.

Additionally, Respondents attempt to paint this Court's analysis of factors relevant to the incompatibility issue in *Gulf Offshore* as an example of potential "creative judicial lawmaking," implying that the Court's analysis was either inappropriate or unnecessary.[8]

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7. Respondents cite only *Ableman v. Booth,* 21 How. (62 U.S.) 506 (1859) and *United States v. Tarble,* 13 Wall. (80 U.S.) 397 (1872) in support of this argument. *Ableman* and *Tarble,* however, are not exclusive jurisdiction cases, but rather deal with limitations on the power of state courts to compel the federal government's compliance with state-court orders.

8. Petitioners, in their Brief, cited a law review article in support of their explication of Alexander Hamilton's view of the concurrent jurisdiction of state courts. (Pet. Br. at 13) (citing Redish and Muench, *Adjudication of Federal Causes of Action in*

(Resp. Br. at 32-33.) The Court's enumeration of relevant factors, however, was not *dictum* as suggested by Respondents, but constituted a substantive part of the *Gulf Offshore* incompatibility analysis. *See Gulf Offshore,* 453 U.S. at 483-84 (citing Redish and Muench, 75 Mich. L. Rev. at 329-35). Thus, contrary to Respondents' repeated attempts to limit the concept of "incompatibility" as expounded by this Court, the test for incompatibility set forth in *Gulf Offshore* should control this case.

B. *Application Of The Gulf Offshore Test For Incompatibility*

Petitioners demonstrated in their Brief that RICO is incompatible with concurrent state-court jurisdiction because federal criminal statutes, which are subject to exclusive federal jurisdiction pursuant to 18 U.S.C. § 3231, must remain under the exclusive purview of the federal courts; because of the need for uniformity and consistency in the interpretation of RICO; and because RICO's procedural mechanisms are incompatible with concurrent state-court jurisdiction. Respondents' arguments in opposition fail to refute any of these points. Petitioners will not reargue all of the points raised in our first Brief but will only address several specific points raised by Respondents.

NOTES *(Continued)*

State Court, 75 Mich. L. Rev. 311, 314 (1976)) (hereinafter "Redish and Muench"). Respondents, however, incorrectly imply that Petitioners cited the Redish and Muench article for a wholly different reason – to urge this Court to engage in "creative judicial lawmaking" when applying the incompatibility prong of the *Gulf Offshore* test. (Resp. Br. at 32.) Petitioners did not advance such an argument in their Brief, and do not do so here. The *Gulf Offshore* test, this Court's benchmark for determining exclusive jurisdiction issues, establishes that jurisdiction over civil RICO actions is exclusively federal. Accordingly, Respondents' opposition to an argument that Petitioners did not make is irrelevant, and should be disregarded.

1. *The Need For Uniformity*

Respondents argue that, since Congress did not expressly include a provision in RICO to insure uniformity, such as creating specialized tribunals or limiting jurisdiction to specific courts, there is no "evidence" that Congress intended to insure uniformity in the construction and application of RICO. (Resp. Br. at 33.) When analyzed, however, the contention that there is no "evidence" of Congressional concern with uniformity is simply a variation on Respondents' theme expressed throughout their Brief that nothing less than an explicit statutory directive can form the basis for a finding of exclusive jurisdiction. To the contrary, the Court in *Gulf Offshore* expressly listed uniformity as one of the factors to be considered in addressing the incompatibility issue and nowhere limited consideration of that issue to the presence or absence of an explicit statutory directive. *See also Claflin,* which refers generally to "incompatibility . . . arising from the nature of the particular case." 93 U.S. at 136.

Next, Respondents argue that the need for uniformity "is particularly weak with respect to RICO," asserting that RICO merely attaches criminal penalties and civil liabilities to conduct that is "already criminal." (Resp. Br. at 34.) That position completely misapprehends the scope of RICO, which attaches such penalties and liabilities, not to conduct that is "already criminal", but *only* to conduct that constitutes a *pattern* of racketeering activity in interstate commerce – an entirely new and uniquely complex federal crime.[9] Moreover, as Petitioners have previously explained (Pet. Br. at 29-33),

9. Similarly, Respondents' argument that "diversities and conflicts" in RICO jurisprudence may be desirable (Resp. Br. at 35) also ignores the need for uniformity and consistency in the orderly development and application of the federal criminal laws. *See H.J. Inc. v. Northwestern Bell Telephone Co.,* 109 S. Ct. 2893, 2908-09 (1989) (Scalia, J., concurring).

uniformity is particularly important because of the need to maintain consistency in the development and application of the federal criminal laws, which comprise most of RICO's predicate offenses.[10]

2. *"Little RICO" Acts*

Respondents also argue that, since some states have "little RICO" laws that incorporate federal predicate acts in their definitions of "racketeering activity", state judges must be presumed to be familiar with the construction of RICO's federal predicate acts. (Resp. Br. at 37 (citing N.J. Stat. Ann. § 2C:41-1a(2); Ohio Rev. Code Ann. § 2923.31(I)(1)).) This argument, however, misses the point. Petitioners have not taken and do not now take the position that state court judges are unable to render decisions competently as to matters arising under RICO. Rather, the opening of state courts to RICO cases would lead to uncertainty in the law under RICO, as well as in the underlying federal criminal laws, because thousands of state trial court judges, scores of intermediate state appellate courts, and fifty state appellate courts of last resort would be permitted to render decisions on RICO. Accordingly, although all courts would be subject to the guidance of this Court in construing the statute, the Congressional command that

10. Respondents also argue that there is "no inherent inconsistency between [sic] state-court jurisdiction over federal civil actions that have federal criminal counterparts." (Resp. Br. at 36 n.25 (citing 42 U.S.C. §§ 1983 and 1988, and 18 U.S.C. § 242).) However, RICO is the only federal statute that incorporates by reference, and includes as part of its substantive civil provisions, a wide range of federal crimes over which Congress did not intend to vest jurisdiction in the state courts. Moreover, with respect to 42 U.S.C. §§ 1983 and 1988, this Court has found an express Congressional intent that jurisdiction over the Civil Rights Act be concurrent. (*See* Pet. Br. at 19 n.13.) No such finding can be made with respect to RICO.

the development and interpretation of the federal criminal laws be vested exclusively in the federal courts would be eviscerated. *See* 18 U.S.C. § 3231; *see also* Pet. Br. at 32-33.

In addition, as Judge Sloviter pointed out in her dissent in *McCarter:*

> [i]n this situation of flourishing state experimentation in the development of anti-rackteering initiatives, it seems . . . that the "diversities and conflicts" which are a beneficial aspect of our federal system and its general rule of concurrent jurisdiction . . . are best prompted by leaving the state courts free to focus on the interpretation and application of their own anti-racketeering laws and confining jurisdiction over the federal statute to the federal courts in keeping with the clear implications in RICO's legislative history.

McCarter, slip op. at 27-28 (Sloviter, J., concurring in part, dissenting in part, and concurring in the judgment).

3. *Arbitrability Of RICO Claims*

Additionally, Respondents argue that because this Court has upheld agreements to arbitrate when claims are based upon RICO, and upon other statutes that indisputably confer exclusive federal-court jurisdiction, there is no inconsistency between state-court jurisdiction and RICO. (Resp. Br. at 27 and n.21, 36-37) (citing *Shearson/American Express, Inc. v. McMahon,* 107 S. Ct. 2332 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985)). This argument is incorrect.

First, and most important, the Court's analyses and decisions in both *McMahon* and *Mitsubishi* were grounded upon the strong federal policy favoring the enforcement of arbitration *agreements. See McMahon,* 107 S. Ct. at 2337; *Mitsubishi,* 473 U.S. at 625-26.

Thus, in each case, the fundamental premise necessary to the result reached by the Court was that the parties had *agreed* in the first place to waive the judicial remedies available under the statutes in question. To overcome their freely made contracts to arbitrate, the plaintiffs in each case were required to demonstrate "that Congress intended to make an exception to the Arbitration Act . . . , an intention discernible from the text, history, or purposes of the statute." *McMahon,* 107 S. Ct. at 2338; *see also Mitsubishi,* 473 U.S. at 628-29. The current case, however, presents a fundamentally different situation: Petitioners made no agreement in which they waived their rights to a federal forum.

Second, Respondents concede that other statutes over which federal courts have exclusive jurisdiction have been held to be subject to arbitration. (Resp. Br. at 27 n.21.) This concession demonstrates conclusively that neither this Court nor Congress has found any inconsistency in subjecting exclusively federal claims to arbitration when the parties have expressly agreed to waive their rights to the federal judicial forum. Accordingly, the decisions in *McMahon* and *Mitsubishi* are not pertinent to the instant case.

4. *Procedural Incompatibility*

Respondents also dispute Petitioners' showing that RICO's procedural mechanisms are incompatible with concurrent state-court jurisdiction by arguing that "the states generally retain the authority to promulgate procedural rules for their courts even where the right being asserted derives from federal law." (Resp. Br. at 38.) This argument, however, ignores RICO's broad procedural mechanisms, which are necessary to implement the purposes and objectives of the statutory scheme. These mechanisms are *not* available in state courts, and the states have no power to enact such extensive procedures. *(See* Pet. Br. at 36-37.)

Respondents point to the fact that the right to attorneys' fees provided by 42 U.S.C. § 1988 may be enforced in state courts even though section 1988 contains "specific procedures for the conduct of federal court proceedings." (Resp. Br. at 39.) This argument is without merit, since section 1988, unlike RICO, does not provide expansive procedural mechanisms which are unavailable to enforce the provisions of the statute in state courts. In any event, section 1988 is an adjunct to section 1983, as to which this Court has found a Congressional intent that jurisdiction be concurrent. *See* note 10 *supra.*

Respondents also cite section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to support their position that the procedural mechanisms of RICO do not point to a finding of exclusive jurisdiction. That statute was analyzed by this Court in *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962), and allegedly contains "enforcement and venue provisions similar to those in RICO." (Resp. Br. at 38.) A simple comparison of section 301 with section 1965 of RICO, however, reveals the plainly erroneous nature of such a contention. The provisions of section 301 which Respondents contend to be similar to those in RICO are limited, and include nothing like the extensive service of process provisions of sections 1965(b), (c) and (d) of RICO.

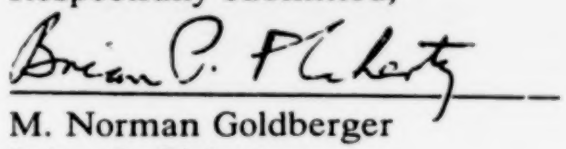
5. *Deprivation Of Petitioners' Federal Forum*

Finally, Respondents argue that "in the ordinary case, neither party will even [sic?] be deprived of the right to choose the *federal* forum if he so wishes." (Resp. Br. at 39) (emphasis in Resp. Br.). As Respondents concede, however, in the instant case Petitioners *have* been foreclosed from pursuing their federal claims in a federal court, contrary to their express choice.

CONCLUSION

For the reasons set forth herein and in the Brief for Petitioners, this Court should reverse the decision of the Court of Appeals, order the Amended Complaints reinstated, and remand the matter for further proceedings consistent with its opinion.

Respectfully submitted,



M. Norman Goldberger
Brian P. Flaherty
*Gary L. Leshko
WOLF, BLOCK, SCHORR
AND SOLIS-COHEN
Twelfth Floor, Packard Building
15th and Chestnut Streets
Philadelphia, PA 19102-2678
(215) 977-2000
Counsel for Petitioners
**Counsel of Record*

Of Counsel:

Lawrence I. Weisman
306A Hampton Plaza
300 E. Joppa Road
Towson, Maryland 20204
(301) 583-9030